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ABSTRACT

Court case citations are organized in six major sections with brief summaries of relevant cases in subcategories followed by a table of cases cited. The major sections are as follows: (1) "Extended School Year (ESY) Services and Disabled Students" (Susan S. Schermerhorn); (2) "Recent Developments in Related Services under the IDEA" (Kathleen S. Mehfoud); (3) "The Fourth Amendment in the Public Schools" (Myron Schreck); (4) "Student Suspensions and Expulsions" (Robert A. Perrotta); (5) "Student Testing" (Debra J. Madsen); and (6) "Student First Amendment Rights in the 1990s" (Charles J. Russo). (MLF)

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Case Citations

1992

THIRTEENTH SERIES

PUPILS

Edited by Fred Hartmeister, Staff Attorney
Wyoming Supreme Court

Number 1 — Extended School Year (ESY) Services and Disabled Students. *Susan S. Schermerhorn*

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Contents

Extended School Year (ESY) Services and Disabled Students 1

Recent Developments in Related Services Under the IDEA 7

The Fourth Amendment in the Public Schools 13

Student Suspensions and Expulsions 21

Student Testing 35

Student First Amendment Rights in the 1990s 39

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Case Citations
Extended School Year (ESY)* Services and Disabled Students

THIRTEENTH Series, Number 1

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Contents

Entitlement Under Federal Law 2
Individuals With Disabilities Education Act (IDEA) 2
Section 504 of the Rehabilitation Act of 1973 2
Eligibility 3
IDEA 3
Section 504 4
Provision of Services 4
IDEA 4
Section 504 4
Table of Cases and Other Authorities 6

*This series does not include those cases involving the issues pertaining to regular summer school participation.

Entitlement Under Federal Law

Individuals With Disabilities Education Act (IDEA), formerly Education for All Handicapped Children Act (EAHCA), 29 U.S.C. §§ 1400, *et seq.*

Pennsylvania's system-wide policy prohibiting publicly-funded education in excess of 180 days violates the mandate for provision of a free appropriate public education under the EAHCA, even though it is applied equally to nonhandicapped children; equality of services and programs is not the test for an appropriate education. Regression and recoupment problems due to summer breaks in programming, which are more severe in some handicapped children than in nonhandicapped students, may prevent some handicapped children from reaching the self-sufficiency goals determined to be reasonable by their educators. ***Armstrong v. Kline***, 476 F. Supp. 583 (E.D. Pa. 1979), *remanded by* 629 F.2d 269 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981).

Categorical limitations on the possible duration of special education programs, such as limiting availability of programs to the regular 180-day school year, are inconsistent with the Act's insistence that programs be formulated to meet the unique needs of each handicapped child. "Rigid rules like the 180-day limitation violate not only the Act's procedural command that each child receive individual consideration but also its substantive requirements that each child receive some benefit and that lack of funds not bear more heavily on handicapped than on nonhandicapped children." ***Battle v. Commonwealth of Pa.***, 629 F.2d 269 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981).

A policy of refusing to consider or provide more than 180 days of education for severely handicapped children is incompatible with the EAHCA, as it precludes individualized consideration of instruction for each child and fails to provide the "basic floor of opportunity" mandated by the Act. ***Yaris v. Special Sch. Dist. of St. Louis County***, 558 F. Supp. 545 (E.D. Mo. 1983), *aff'd*, 728 F.2d 1055 (8th Cir. 1984).

Mississippi's policy of refusing categorically to consider extension of special education services beyond 180 days prevents educational employees from determining which children, if any, require year-round educational programs, in violation of the EAHCA. Lack of funds may not limit availability of appropriate educational services to handicapped children more severely than it does to nonhandicapped children. ***Crawford v. Pittman***, 708 F.2d 1028 (5th Cir. 1983).

The wholesale failure of the state to require or provide services beyond the 180-day regular school year fails both prongs of the inquiry mandated by *Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley*, 458 U.S. 176 (1982): (1) Has the state complied with the procedures set forth in the Act; and, (2) is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? ***Georgia Ass'n of Retarded Citizens v. McDaniel***, 716 F.2d 1565 (11th Cir. 1983), *cert. granted and judgment vacated on other grounds*, 468 U.S. 1213 (1984)

The mandate to provide a free appropriate public education to disabled students prohibits predetermination of the length of school year without consideration of individual needs. ***Hamilton County Sch.***, 18 IDELR 338 (SEA TN 1991). *Accord*, ***North Adirondack Cent. Sch. Dist. Bd. of Educ.***, 18 IDELR 36 (SEA NY 1991); ***Dubuque Community Sch. Dist.***, 18 IDELR 331 (SEA IA 1991).

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794

Allegations that due to their handicaps, students will substantially regress during summer break without summer services and that the school district refused to provide such services state a claim under section 504. ***Phipps v. New Hanover County Bd. of Educ.***, 551 F. Supp. 732 (E.D.N.C. 1982).

A state policy limiting special education services to the 180-day school year precludes consideration of individualized needs of all handicapped children, thereby denying such children the opportunity to benefit from education that is available to nonhandicapped students. The policy is therefore discriminatory in violation of section 504. ***Yaris v. Special Sch. Dist. of St. Louis County***, 558 F. Supp. 545 (E.D. Mo. 1983), *aff'd*, 728 F.2d 1055 (8th Cir. 1984).

ESY should be regarded as one additional means of providing a handicapped student with specialized instruction in accordance with an individualized educational program. In considering eligibility for ESY, a district should consider, at a minimum: (1) the nature of the student's handicapping condition(s); (2) the severity of the handicapping condition(s); (3) the areas of learning crucial to attaining the goal of self-sufficiency and independence from caretakers; (4) the extent of regression caused by an interruption in educational programming; and (5) the rate of recoupment following an interruption in educational programming. ***Lee v. Thompson***, EHLR 554:429 (D. Haw. 1983).

Eligibility

IDEA

Where a child has demonstrated continuous educational progress, despite breaks in programming, a school district is not required to provide ESY, even if the child would benefit from such services. ***Anderson v. Thompson,*** 495 F. Supp. 1256 (E.D. Wis. 1980), *aff'd*, 658 F.2d 1205 (7th Cir. 1981).

Absent evidence that regression suffered as a result of a summer break in programming is extraordinary or unretrievable, a summer program is not required. ***Bales v. Clarke,*** 523 F. Supp. 1366 (E.D. Va. 1981).

An ESY is appropriate if it would prevent significant regression of skills or knowledge retained by the child so as to seriously affect his progress toward self-sufficiency (i.e., serious regression/recoupment problems). A child is not, however, entitled to an ESY merely because the services would be beneficial, but only if such services are necessary to permit a child to benefit from instruction. ***Rettig v. Kent City Sch. Dist.,*** 539 F. Supp. 768 (N.D.Ohio 71981), *aff'd in part and vacated in part on other grounds*, 720 F.2d 463 (6th Cir. 1983); *cert. denied*, 467 U.S. 1201 (1984).

In determining whether a child requires services beyond the regular academic year, "the issue is whether benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an educational program during the summer months." ***Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.,*** 790 F.2d 1153 (5th Cir. 1986).

Eligibility for ESY services does not require the existence of regression/recoupment problems in academic areas. An emotionally disturbed student, whose academic performance is satisfactory, but who, during home visits and vacations, experiences regression in emotional, behavioral and social areas may be eligible for ESY. ***Bucks County Pub. Sch. Intermediate Unit No. 722 v. Commonwealth Dep't of Educ.,*** 529 A.2d 1201 (Pa. Commw. Ct. 1987).

If a child demonstrates meaningful progress during the regular academic year, a school district has met its obligations under the IDEA, unless the educational benefits accrued during the school year will be significantly jeopardized by a break in services. If a child has either regressed in the past to the serious detriment of his educational progress, or expert opinion, based upon a professional individual assessment, establishes that serious regression/recoupment problems are likely without an ESY, ESY services must be provided. Despite the heavy burden of custodial care for some handicapped students, school districts have no duty under the IDEA to provide such care where similar provisions are not made for nonhandicapped students. ***Cordrey v. Euckert,*** 917 F.2d 1460 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 1391 (1991).

In determining whether an ESY is required, "the issue is whether the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an educational program during the summer months. . . . Under the Act, both documentation concerning past regression and predictions of future regression should be considered, an analysis which requires investigations into many aspects of the child's educational, home, and community life." Such aspects may include the degree of impairment, the degree of regression suffered, the recovery time from the regression, the ability of the child's parents to provide the educational structure at home, the child's rate of progress, the child's behavioral and physical problems, the availability of alternative resources, the ability of the child to interact with nonhandicapped children, the areas of the child's curriculum that need continuous attention, the child's vocational needs, and whether the requested service is extraordinary for the child's condition, as opposed to an integral part of a program for those with the child's condition. ***Johnson by and through Johnson v. Independent Sch. Dist. No. 4 of Bixby, Tulsa County, Okla.,*** 921 F.2d 1022 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 1685 (1991).

The factors enunciated by the Tenth Circuit in Johnson by and through *Johnson v. Independent School District No. 4 of Bixby, Tulsa County, Oklahoma.*, 921 F.2d 1022 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 1685 (1991), are to be considered, along with other predictive data, in determining whether a child's level of achievement would be jeopardized by a summer break in the child's structured educational programming. *Johnson* should not be interpreted to require consideration of the enumerated factors outside the context of this analysis. ***Association for Community Living in Colo., et al. v. Romer, et al.,*** Civil Action No. 91-Z-776 (D. Colo., November 6, 1991) (Plaintiffs contend that the use of a regression/recoupment analysis, alone, violates the individualization requirement of the IDEA and *Johnson*. Case continues pending development of new state guidelines for ESY eligibility.)

There is no violation of the EAHCA where a student is determined to be eligible for ESY for only one short-term objective on the individualized educational program, based on a total of nine days of testing before and after a school break to determine the existence of regression and recoupment problems. ***Allegheny Intermediate Unit #3,*** 16 EHLR 625 (SEA PA 1989).

Where parents provide summer services at a private facility, during which the student makes significant gains, the district cannot deny ESY eligibility based solely on the absence of regression upon the child's return to school in the fall. The proper inquiry is whether the child would have suffered substantial loss of skills, which he could not have recouped in a reasonable time, if he had been deprived of summer services. ***Montgomery County (Md.) Pub. Schs.***, 16 EHLR 201 (SEA MD 1989).

State guidelines limiting ESY eligibility to children with severe disabilities who require a minimum of five hours of special education instruction per day in a structured learning environment inhibit full consideration of individual needs as required by the EAHCA. ***Libous***, 17 EHLR 7419 (OSERS 1990). *See also* ***Baugh*** EHLR 211:481 (EHA Rulings/Policy Letters 1987).

Where academic regression was not a concern and the student demonstrated reasonable progress during the prior school year at a nonpublic children's center, no ESY services were required. ***Richfield Joint Sch. Dist. No. 1***, 18 IDELR 168 (SEA TN 1991).

Section 504

Where a district determined eligibility for ESY for students with disabilities in accordance with established procedures, teachers kept notes on progress on short-term objectives, staff was instructed to be aware of changes in performance after vacations, parents were notified of the availability of ESY, a district manual described the circumstances under which ESY would be provided and the district determined that a small number of disabled students were eligible for ESY, there was no violation of section 504 (specifically, 34 C.F.R. §§ 104.33, 104.34 or 104.36). The eligibility standard applied, whether the child demonstrated significant regression and recoupment problems or little or no progress during the regular school year, based upon frequently collected data, was not patently inconsistent with section 504. ***Westerville (Ohio) City Sch. Dist.***, 17 EHLR 1012 (OCR 1991).

Limiting ESY services to those with needs in self-sufficiency areas violates section 504, because eligibility determinations are not based on individual needs. ***Mesa (Ariz.) Pub. Sch.***, 16 EHLR 316 (OCR 1989). *See also* ***Baltimore (Md.) City Pub. Schs.***, EHLR 352:185 (OCR 1986).

Provision of Services

IDEA

Summer enrichment activities that are essentially non-instructional in nature, such as camping, field trips, swimming, other sports, playground recreational activities, gardening and work training skills, fall within the definition of "special education" and "related services" where it is established that a program involving outdoor activities is necessary for a child to obtain an appropriate education under the EAHCA. ***Birmingham and Lamphere Sch. Dist. v. Superintendent of Pub. Instruction for State of Mich.***, 328 N.W.2d 59 (Mich. Ct. App. 1982).

A child's entire individualized educational program (IEP) for the regular school year does not have to be implemented in the child's ESY program. "Since the purpose of the ESY program is to prevent regression and recoupment problems," a child's IEP for summer services may differ from the regular IEP. A district is not required to establish public programs for ESY services, if the district does not offer public programs for nonhandicapped students during the same period. The district may meet its ESY obligations by purchasing private services. Because the EAHCA does not address the obligation of districts to modify existing programs to ensure education in the least restrictive environment, any modifications necessary to implement a child's ESY IEP must be determined on a case-by-case basis. ***Myers***, 16 EHLR 290 (OSEP 1989).

Provision of an ESY, along with other program elements, may avoid the need for a residential placement. Where a twelve-month day program is otherwise sufficient to meet a disabled child's educational needs, residential placement is not required for educational reasons, even where the residential placement may be appropriate for other reasons. ***Williams by and through Wilson v. Gering Pub. Schs.***, 463 N.W.2d 799 (Neb. 1990).

Section 504

Advising parents that summer services generally will be one-half the amount of regular year services is permissible, if additional services are provided when necessary for a free appropriate public education. ***Rockwood (Mo.) R-VI Sch. Dist.***, 16 EHLR 506 (OCR 1989).

Predetermined length of summer services violates section 504. The duration of summer services must be determined based on individual needs. ***Corpus Christi (Tex.) Indep. Sch. Dist.***, 16 EHLR 121

(OCR 1989). *See also* ***Dallas County (Tex.) Suburban Coop. and Dallas County Schs.***, EHLR 352:360 (OCR 1987).

Provision of ESY services in a building without air conditioning did not violate 34 C.F.R. 104.4(a) or (b)(5)(ii) or 104.33(a) or (b), where the affected children's IEPs did not indicated a need for air conditioning and the opportunity for a temporary transfer was provided through consultation of a child's physician with a physician for the local educational agency. ***BOCES II*** (N.Y.), 17 EHLR 764 (OCR 1991).

Table of Cases

Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ./3
Anderson v. Thompson/3
Armstrong v. Kline/2
Association for Community Living in Colo., *et al.* v. Romer, *et al.*/3
Bales v. Clarke/3
Battle v. Commonwealth of Pa./2
Birmingham and Lamphere Sch. Dist. v. Superintendent of Pub. Instruction for State of Mich./4
Bucks County Pub. Schs. Intermediate Unit No. 722 v. Commonwealth Dep't. of Educ./3
Cordrey v. Euckert/3
Crawford v. Pittman/2
Georgia Ass'n of Retarded Citizens v. McDaniel/2
Johnson by and through Johnson v. Independent Sch. Dist. No. 4 of Bixby, Tulsa County, Okla./3
Lee v. Thompson/2
Phipps v. New Hanover County Bd. of Educ./2
Rettig v. Kent City Sch. Dist./3
Williams by and through Wilson v. Gering Pub. Sch./4
Yaris v. Special Sch. Dist. of St. Louis County/2

Other Authorities

Allegheny Intermediate Unit #3/3
Baltimore (Md.) City Pub. Schs./4
Baugh/4
BOCES II (N.Y.)/5
Corpus Christi (Tex.) Indep. Sch. Dist./4
Dallas County (Tex.) Suburban Coop. and Dallas County Schs./5
Dubuque Community Sch. Dist./2
Hamilton County Sch./2
Libous/4
Mesa (Ariz.) Pub. Schs./4
Montgomery County (Md.) Pub. Schs./4
Myers/4
North Adirondack Cent. Sch. Dist. Bd. of Educ./2
Richfield Joint Sch. Dist. No. 1/4
Rockwood (Mo.) R-VI Sch. Dist./4
Westerville (Ohio) City Sch. Dist./4

Case Citations
Recent Developments in Related Services Under the Idea

THIRTEENTH Series, Number 2

Prepared by Kathleen S. Mehfound, Attorney
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Contents

Qualifying for Related Services 8

Interruptions in Service Delivery 8

Categories of Services 8

- Catheterization 8
- Complex Nursing 8
- Counseling Services 9
- Drug Treatment 9
- Equipment 9
- Feeding Programs 9
- Hospitalization 9
- Interpretive Services 9
- Limited Medical Services 9
- Medical Evaluations 9
- Occupational and Physical Therapies 10
- Other Education Services 10
- Psychiatric Services 10
- School Health Services 10
- Speech/Language Services 10
- Transportation 10

Table of Cases and Other Authorities 12

Qualifying For Related Services

To determine whether a handicapped student qualifies for related services, a four-part test shall be applied:

a. The student must be handicapped.
b. The related service must be necessary for the student to receive benefit from his special education program.
c. The service cannot be deemed "medical" under the EAHCA.
d. The request must be for services only, not equipment.

Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 104 S. Ct. 3371, 82 L. Ed. 2d 664 (1984).

Students who are handicapped under 504 but not under EAHCA and who are placed in regular education are entitled to related services, if necessary, for a "free appropriate public education" (FAPE). ***Elizabeth S. v. Gilhool,*** EHLR 558:461 (M.D. Pa. 1987).

If the state standard for the provision of related services is higher than the threshold standard of the EAHCA, then additional related services may be required. ***Krichinsky v. Knox County Schs.,*** 17 EHLR 725 (E.D. Tenn. 1991).

The request of a child with a profound hearing impairment for cued speech interpreter services to be provided at his parochial school was denied because it would violate the First Amendment prohibition against governmental entanglement with religion. ***Goodall by Goodall v. Stafford County Sch. Bd.,*** 930 F.2d 363 (4th Cir. 1991), *cert. denied,* 112 S. Ct. 188 (1991).

Interruptions in Service Delivery

* For a student handicapped under both the EAHCA and 504, the failure to provide twenty sessions of speech and language services over a school year violated § 504 of the Rehabilitation Act. The fact that the speech therapist was sick for some of the days and engaged in administrative duties such as individualized education program (IEP) development on other days did not excuse the failure. ***Angleton (Tex.) Indep. Sch. Dist.,*** 16 EHLR 299 (OCR 1989).

* School Divisions will not be liable to make up missed special education services which occur due to school closings for inclement weather and student absences. Services missed due to teacher absence must be made up by the teacher or a substitute. ***Jefferson County (W. Va.) Pub. Schs.,*** 16 EHLR 471 (OCR 1989).

*** Denotes cases decided under 504 of the Rehabilitation Act.**

Unwarranted cessation of occupational therapy (OT) and physical therapy (PT) services must be made up by compensatory services. ***Pittsburgh Bd. of Educ. v. Commonwealth, Dep't of Educ.,*** 581 A.2d 681 (Pa. Commw. Ct. 1990).

Categories of Services

Catheterization

Catheterization is a related service and not a medical service because it does not require medical expertise to perform and is necessary to assist a handicapped student to attend school. ***Irving Indep. Sch. Dist. v. Tatro,*** 468 U.S. 883, 104 S. Ct. 3371, 82 L. Ed. 2d 664 (1984).

Complex Nursing

The EAHCA does not require school boards to pay for a licensed health care professional or respiratory therapist to accompany a ventilator dependent student to and from a day educational program. ***Hopedale Sch. Dist.,*** 17 EHLR 973 (SEA MA 1991).

Medicaid may be responsible to fund nursing services at school. ***Detsel by Detsel v. Sullivan,*** 895 F.2d 58 (2d Cir. 1990); ***Pullen v. Cuomo,*** 18 IDELR 132 (N.D.N.Y. 1991).

Full time nursing services were requested to be provided at school for girl who suffers from fetal face syndrome, severe broncho-pulmonary dysplasia, profound mental retardation, spastic quadriplegia, seizure disorder, blindness, and hydrocephalus. The student also required tracheostomy and gastrostomy tubes. The court refused to order the school district to provide the nursing services finding that they were medical services due to the specialized nature of the service, the time-consuming quality of the service and the varied and intensive vigilance required. ***Bevin H. by Michael H. v. Wright,*** 666 F. Supp. 71 (W.D. Pa. 1987).

Severely disabled student required constant respirator assistance, oxygen and the services of an individual trained to monitor her health. The court held that the requested services were medical and it was not the responsibility of the school district to provide constant, in-school nursing care. ***Detsel by Detsel v. Board of Educ. of Auburn Enlarged City Sch. Dist.,*** 637 F. Supp 1022 (N.D.N.Y. 1986) *aff'd,* 820 F.2d 587 (2d Cir. 1987); *cert. denied,* 484 U.S. 981 (1987).

Counseling Services

Counseling services provided by a medical doctor will not automatically qualify as medical services if they are otherwise available under the EAHCA. The nature of the services is the controlling factor. ***Tice by and through Tice v. Botetourt County Sch. Bd.***, 908 F.2d 1200 (4th Cir. 1990); ***Clovis Unified Sch. Dist. v. California Office of Admin. Hearings***, 903 F.2d 635 (9th Cir. 1990); ***Max M. v. Thompson***, 592 F. Supp. 1437 (N.D. Ill. 1984), *on reconsideration*, 629 F. Supp. 1504 (N.D. Ill. 1986).

An in-home behavioral management program is not a related service for student who did not need it to receive educational benefit. On the other hand, the service was the responsibility of the Department of Human Resources as part of a habilitation plan. ***Burke County Bd. of Educ. v. Denton***, 895 F.2d 973 (4th Cir. 1990).

Counseling to students and group therapy are provided when necessary for FAPE. ***Doe v. Anrig***, 651 F. Supp. 424 (D. Mass. 1987).

Family counseling must be included in the student's individualized education program (IEP) if necessary for the student to receive educational benefit. ***Dole***, EHLR 211:399 (OSERS 1986).

Drug Treatment

Drug treatment program was not a service because the program was designed to cure an illness, not to assist the student in deriving a benefit from his educational program. ***Field v. Haddonfield Bd. of Educ.***, 769 F. Supp. 1313 (D.N.J. 1991).

Equipment

Wheelchairs may be a related service. ***Stohrer***, EHLR 213:209 (OSEP 1989).

Feeding Programs

Gastric tube care must be provided if necessary for student to remain in school. ***Granite Sch. Dist.***, 16 EHLR 1065 (SEA UT 1990).

A special diet that must be provided during the school day is a related service under the EAHCA. ***Williamson***, EHLR 211:419 (OSEP 1986).

Hospitalization

The EAHCA does not require school boards to pay the expenses of hospitalization. ***Tice by and through Tice v. Botetourt County Sch. Bd.***, 908 F.2d 1200 (4th Cir. 1990).

Placement in a hospital may be allowed if the facility provides a fulltime educational program. The IEP dictates the child's program and the hospitalization was not primarily for medical reasons. ***Taylor by and through Taylor v. Honig***, 910 F.2d 627 (9th Cir. 1990).

Interpretive Services

Interpreting services need not be provided to a handicapped student educated at a sectarian school. ***Zobrest v. Catalina Foothills***, EHLR 441:564 (D. Ariz. 1989); ***Goodall v. Stafford County Sch. Bd.***, Civ. Action No. 89-1450-A (E.D.Va. Feb. 9, 1990), *aff'd*, 930 F.2d 363, (4th Cir. 1991), *cert. denied*, 112 S. Ct. 188 (1991).

Deaf parents of non-handicapped students are entitled to have access to interpreters for teacher conferences to insure access to information about the child's progress in school. ***Rothschild v. Grottenthaler***, 907 F.2d 286 (2d Cir. 1990).

Interpreter services must be provided to students who need the assistance for educational benefit. ***Cleveland (Ohio) Pub. Sch. Dist.***, EHLR 353:307 (OCR 1989).

Limited Medical Services

Psychotherapy provided by a medical doctor may be reimbursed as a related service. One must consider the nature of the service, not the provider. ***Clovis Unified Sch. Dist. v. California Office of Admin. Hearings***, 903 F.2d 635 (9th Cir. 1990).

Placement of emotionally disturbed (ED) student in residential rehabilitation facility was educationally necessary and not primarily for medical treatment. ***Brown by and through Brown v. Wilson County Sch. Bd.***, 747 F. Supp. 436 (M.D. Tenn. 1990).

Medical Evaluations

Medical evaluations are provided at school board expense if necessary to plan an appropriate

IEP. ***Doe v. The Bd. of Pub. Educ. of Nashville—Davidson County***, EHLR 441:106 (M.D. Tenn. 1988).

A neurological evaluation may be required as a medical evaluative service. ***Seals v. Loftis***, 614 F. Supp. 302 (E.D. Tenn. 1985).

Occupational and Physical Therapies

OT and PT are related services which must be provided if necessary for the provision of appropriate services. ***Mineral County (W. Va.) Schs.***, 16 EHLR 904 (OCR 1990).

There can be no blanket prohibition regarding the receipt of related services such as physical therapy by severely handicapped students. ***Polk v. Central Susquehanna Intermediate Unit 16***, 853 F.2d 171 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989).

Other Educational Services

Technology Related Assistance Grants may be forthcoming. ***Hamilton***, EHLR 213:269 (OSERS 1989). *See also*, ***Goodman***, 16 EHLR 1317 (OSEP 1990)).

School district was required to provide staff training in proper administration of inhaler for use in emergencies with asthmatic students. ***Culver City (Cal.) Unified Sch. Dist.***, 16 EHLR 673 (OCR 1990).

Vision services for visually impaired students are a related service which may be provided and, once provided, cannot be unilaterally ceased. ***Berkeley County (W. Va.) Sch. Dist.***, 16 EHLR 900 (OCR 1990).

The list of related services provided in the regulations is not exhaustive. Orientation and mobility training are examples of services not listed but which may be required. ***Will***, EHLR 213:198 (OSERS 1989).

Psychiatric Services

Psychiatric services are not a related service because they are provided by a physician. ***Darlene L. v. Illinois State Bd. of Educ.***, EHLR 554:532 (N.D. Ill. 1983). But see, ***Tice by and through Tice v. Botetourt County Sch. Bd.***, 908 F.2d 1200 (4th Cir. 1990).

Psychiatric hospitalization for non-educational reasons is not reimbursable under EAHCA. ***Metropolitan Gov't of Nashville and Davidson County v. Tennessee Dep't of Educ.***, EHLR 441:450 (Tenn. Ct. App. 1989).

Where hospitalization is not necessary for educational benefit but is necessary for treatment of illness, the school district is not required to fund the placement. ***Clovis Unified Sch. Dist. v. California Office of Admin. Hearings***, 903 F.2d 635 (9th Cir. 1990).

School Health Services

Administration of medication must be done by school if lay person can easily administer and if required during school day. ***Berlin Brotherswalley (Pa.) Sch. Dist.***, EHLR 353:124 (OCR 1988).

Reinsertion of a tracheotomy tube by school districts has been required in some cases. ***Department of Educ., State of Haw. v. Katherine D.***, (D. Haw. 1982), *aff'd in part and rev'd in part*, 727 F.2d 809 (9th Cir. 1983), *cert. denied*, 471 U.S. 1117 (1985).

Speech/Language Services

Speech/Language services cannot be categorically denied to hearing-impaired students. ***Chicago (Ill.) Pub. Sch., Dist. #299***, 16 EHLR 319 (OCR 1989).

Transportation

Transportation for a hearing-impaired student to a private clinic for bimonthly unisensory auditory therapy was granted due to urgency of situation because of student's imminent hearing loss. ***School Dist. of Philadelphia v. Commonwealth of Pa. Dep't of Educ.***, EHLR 441:341 (Pa. Commw. Ct. 1988).

Transportation includes travel to and from school and between schools as well as specialized equipment if required by the student's handicap. ***34 C.F.R. §300.13(b)(13).*** 16 EHLR 501 (OSERS 1990).

It is impermissible to provide shortened school days due to transportation scheduling problems. It would be permissible to provide 70 shortened days based on educational needs. ***Sikestown (Mo.) R-VI Sch. Dist.***, 16 EHLR 467 (OCR 1989); ***Duchesne County (Utah) Sch. Dist.***, 17 EHLR 240 (OCR 1990). *See also* ***Lincoln County (N.C.) Sch. Dist.***, 17 EHLR 1052 (OCR 1991).

Failure to provide backup vehicles on a consistent basis in the event of a mechanical failure denies handicapped students access to adequate transportation. ***Muscogee County (Ga.) Sch. Dist.***, 16 EHLR 44 (OCR 1989).

Handicapped students may not be transported for longer periods than non-handicapped students. ***Atlanta (Ga.) Pub. Sch.***, 16 EHLR 19 (OCR 1989).

If the school division offers an appropriate program including transportation within the school division, it is not obligated to provide transportation to another facility located outside of the district. ***School Bd. of Pinellas County v. Smith***, 537 So. 2d 168 (Fla. Dist. Ct. App. 1989).

The school board's policy of limiting transportation for door-to-door service was permissible under applicable case law and, thus, the district was not obligated to provide an aide to carry a non-ambulatory child inside her home and up a flight of stairs. ***Independent Sch. Dist. (Minn.)***, 17 EHLR 21 (1990).

Transportation for a student enrolled in a private school program is required only if it is established that:

(1) the child is handicapped;
(2) the transportation is a related service;
(3) the related service is required by the unique needs of the child caused by the handicap; and
(4) the EAHCA requires the provision of the services under the circumstances of the case.

McNair v. Oak Hills Local Sch. Dist., 872 F.2d 153 (6th Cir. 1989).

Transportation that is not specialized but is regular transportation is not a related service. ***McNair v. Oak Hills Local Sch. Dist.***, 872 F.2d 153 (6th Cir. 1989).

Table of Cases

Bevin H. by Michael H. v. Wright/8
Brown by and through Brown v. Wilson County Sch. Bd./9
Burke County Bd. of Educ. v. Denton/9
Clovis Unified Sch. Dist. v. California Office of Admin. Hearings/9, 10
Darlene L. v. Illinois State Bd. of Educ./10
Department of Educ., State of Haw. v. Katherine D./10
Detsel by Detsel v. Board of Educ. of Auburn Enlarged City Sch. Dist./8
Detsel by Detsel v. Sullivan/8
Doe v. Anrig/9
Doe v. The Bd. of Pub. Educ. of Nashville—Davidson County/10
Elizabeth S. v. Gilhool/8
Field v. Haddonfield Bd. of Educ./9
Goodall by Goodall v. Stafford County Sch. Bd./8, 9
Irving Indep. Sch. Dist. v. Tatro/8
Krichinsky v. Knox County Schs./8
Max M. v. Thompson/9
McNair v. Oak Hills Local Sch. Dist./11
Metropolitan Gov't of Nashville and Davidson County v. Tennessee Dep't of Educ./10
Pittsburgh Bd. of Educ. v. Commonwealth Dep't of Educ./8
Polk v. Central Susquehanna Intermediate Unit 16/10
Pullen v. Cuomo/8
Rothschild v. Grottenthaler/9
School Bd. of Pinellas County v. Smith/11
School Dist. of Philadelphia v. Commonwealth of Pa. Dep't of Educ./10
Seals v. Loftis/10
Taylor by and through Taylor v. Honig/9
Tice by and through Tice v. Botetourt County Sch. Bd./9, 10
Zobrest v. Catalina Foothills/9

Other Authorities

Angleton (Tex.) Indep. Sch. Dist./8
Atlanta (Ga.) Pub. Sch./11
Berkeley County (W. Va.) Sch. Dist./10
Berlin Brothersvalley (Pa.) Sch. Dist./10
Chicago (Ill.) Pub. Schs., Dist. #299/10
Cleveland (Ohio) Pub. Sch. Dist./9
Culver City (Cal.) Unified Sch. Dist./10
Dole/9
Duchesne County (Utah) Sch. Dist./10
Goodman/10
Granite Sch. Dist./9
Hamilton/10
Hopedale Sch. Dist./8
Independent Sch. Dist. (Minn.)/11
Jefferson County (W. Va.) Pub. Schs./8
Lincoln County (N.C.) Sch. Dist./10
Mineral County (W. Va.) Schs./10
Muscogee County (Ga.) Sch. Dist./11
Sikestown (Mo.) R-VI Sch. Dist./10
Stohrer/9
Will/10
Williamson/9
34 C.F.R. § 300.13(b)(13)/10

Case Citations
THE FOURTH AMENDMENT IN THE PUBLIC SCHOOLS

THIRTEENTH Series, Number 3

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Contents

The Reasonableness Standard 14

Individuals Suspicion 15

Testing Students for Drugs 16

Canine Sniffing for Drugs 16

Student Lockers 17

Student Automobiles 17

Strip Searches 17

Police Involvement 18

Consent Searches 18

Exclusionary Rule 19

Table of Cases 20

The Reasonableness Standard

The United States Supreme Court held that, when conducting searches of students in school, public school officials are government officials, rather than private citizens. Although search warrants are not required, searches of public school students must be based on reasonable grounds for suspecting that the search would uncover evidence of a violation of either the law or the rules of the school. In addition, the scope of the search must be reasonable, and not excessively intrusive, based on the nature of the suspected infraction and the student's age and sex. The Court held that the vice principal's search of a student's purse, based on a teacher's report that the student had been smoking in the lavatory, was based upon reasonable suspicion and did not violate the Fourth Amendment. ***New Jersey v. T.L.O.,*** 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).

A search based on a teacher's observation of students with cigarettes engaging in a "suspicious" "exchange" in an off-limit area was not founded on reasonable suspicion. The behavior observed by the teacher did not suggest misconduct other than the possession of cigarettes. Therefore, doing more than confiscating the cigarettes was unreasonable. The court also noted that the teacher had failed to describe the behavior in detail and articulate clearly the reason for suspicion. ***T.A. O'B. v. State,*** 459 So. 2d 1106 (Fla. Dist. Ct. App. 1984).

The burden rests on school administrators to establish that a specific rule or law has been violated and that a search could reasonably be expected to produce evidence of that violation. It was held that a student's absences from school, hiding in the parking lot, and lying about her name when found by a school security guard did not create a reasonable suspicion that she possessed drugs. ***Cales v. Howell Pub. Schs.,*** 635 F. Supp. 454 (E.D. Mich. 1985).

Reasonable suspicion requires articulable facts together with rational inferences from those facts, not merely rumor or hunch. A school official searched a student who had tried to hide a bulging calculator case, refused to consent to search, and demanded that the official obtain a search warrant. The court held that there was insufficient information to support a reasonable suspicion of illegal conduct. A student's assertion of his right to privacy cannot by itself trigger reasonable suspicion. ***In re William G.,*** 221 Cal. Rptr. 118, 709 P.2d 1287 (Cal. 1985).

Information given to an assistant principal that a student had been drinking at home before coming to school supported a reasonable suspicion justifying the search of the student's locker for alcohol. ***State v. Joseph T.,*** 336 S.E.2d 728 (W. Va. 1985).

A search may not exceed the scope of the suspicion. Where a teacher observed a student take a pack of cigarettes from his locker, the search for and confiscation of the cigarettes was supported by reasonable suspicion. However, the subsequent search of the student's locker for drugs was not supported by reasonable suspicion because there was no reason to suspect that additional cigarettes or drugs would be found in the locker. ***In Interest of Dumas,*** 515 A.2d 984 (Pa. Super. Ct. 1986).

A search of a student's locker and of a metal box in the locker was based on reasonable suspicion and permissible in its scope because the search was justified at its inception. An informant told the school vice-principal that the student had been selling drugs from the metal box. The vice-principal also believed the student was selling drugs based on prior reports from teachers, her own observations, and the fact that the student had been known to frequent a location believed to be the site of drug trafficking. ***State v. Brooks,*** 718 P.2d 837 (Wash. Ct. App. 1986).

A student discovered in the school bleachers during class hours was searched for drugs by the school principal because the student's name had been mentioned in staff conversations on drug use and sales at school. The search was not based on reasonable suspicion because no suspicious activity had been observed and the principal had no specific reports of drug use involving the student. In addition, students went to the bleachers for a variety of reasons other than using drugs. ***Matter of Appeal in Pima County Juvenile Action No. 80484-1,*** 733 P.2d 316 (Ariz. Ct. App. 1987).

The possibility of an innocent explanation does not deprive a school police officer of the capacity to entertain a reasonable suspicion of criminal conduct. An officer observed an exchange of money between students in an area where twice before the officer had detained students in drug related matters. The detention of the students was justified by reasonable suspicion. The reputation of an area for criminal activity is an articulable fact upon which a police officer may legitimately rely. ***In re Frederick B.,*** 237 Cal. Rptr. 338 (Cal. Ct. App. 1987).

An assistant principal searched a student suspected of possessing a knife. During the course of the search, a small plastic bag was discovered and searched for drugs. Although the search for the knife was justified, the search of the bag for drugs was merely a "scavenger hunt," not based on reasonable suspicion. ***T.J. v. State,*** 538 So. 2d 1320 (Fla. Dist. Ct. App. 1989).

A student's truancy, his presence in an area where thefts had previously occurred, and his prior propensity to get into trouble supported a

reasonable suspicion that the student was engaged in either illegal activity or the violation of school rules. ***Coffman v. State***, 782 S.W.2d 249 (Tex. Ct. App. 1989).

Two students informed a teacher that a fellow student had just shown them a gun. When the teacher passed the information to the assistant principal without revealing the identity of the informers, but with assurances that the students were reliable. The court held that reasonable suspicion existed to search the student because the informants had asserted personal knowledge of the illegal conduct. ***Commonwealth v. Carey***, 554 N.E.2d 1199 (Mass. 1990).

Where the student informer reported the observation of drugs and the principal questioned the informer to determine that there was no animosity because the informer and the suspected students, the court held that the informer's report was sufficiently reliable to justify a search. ***Williams by Williams v. Ellington***, 936 F.2d 881 (6th Cir. 1991).

Individualized Suspicion

The United States Supreme Court refused to decide whether individualized suspicion is an essential element of the reasonable suspicion requirement for the search of public school students. But the Court noted that individual suspicion has not been required under other circumstances where the privacy interests implicated by a search were minimal and other safeguards were available to assure that the suspect's privacy was not subject to the discretion of the officials conducting the search. ***New Jersey v. T.L.O.***, 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).

Recently, in a non-school search case, the United States Supreme Court held that individualized suspicion was not required for certain highway sobriety checkpoints where motorists were briefly stopped and questioned. The Court applied a three prong test to determine if the stops were reasonable under the Fourth Amendment. The Court balanced (1) the state's interest in achieving its goal, (2) the effectiveness of the search or seizure program in achieving that goal, and (3) the level of intrusion on privacy in light of the administrative guidelines designed to minimize the discretion of police officers in conducting stops. ***Michigan Dep't of State Police v. Sitz***, 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990).

A search of a student based solely on his friendship with a fellow student who had fainted from drug use, was not based on reasonable suspicion of misconduct. ***R.J.M. v. State***, 456 So. 2d 584 (Fla. Dist. Ct. App. 1984).

A general search of the luggage of students going on a field trip to Canada was unreasonable. School officials must have some basis for believing that drugs or alcohol would be found in the luggage of each individual student searched. Although there was a statistical possibility that some student might possess contraband, the Fourth Amendment demands that the suspicion be particularized with respect to each individual searched. ***Kuehn v. Renton Sch. Dist. No. 403***, 694 P.2d 1078 (Wash. 1985).

During a field trip, a school official searched the hotel rooms of several students because of reports from chaperons that some students may have consumed alcohol on the trip and may have alcohol in their rooms. The court refused to dismiss a claim against the school official, explaining that a jury could find that the search was unreasonable due to the lack of individualized suspicion with respect to the students who were bringing the claim. ***Webb v. McCullough***, 828 F.2d 1151 (6th Cir. 1987).

A middle school principal ordered mass searches of all students in several instances. One time, when hearing a report that several students arriving on school buses were carrying "Walkman" devices or radios, the principal ordered a search of all student bookbags and pocketbooks for these devices. Another time, after smelling marijuana smoke in two hallway areas near the school cafeteria, the principal ordered a search of all student pocketbooks and bookbags, as well as the pockets of all male students. The Walkman search was unreasonable because there was no reasonable suspicion that the search of any given student would turn up evidence. The marijuana search was unjustified because students had been in class at the time and the odor had been detected in hallways accessible to nonstudents. Individualized suspicion was required for these searches, but the court did not hold that individualized suspicion is essential for all school searches. A different result might have occurred had the school presented additional evidence showing that drug use was pervasive or that an emergency existed requiring an immediate search without time to develop individualized suspicion. ***Burnham v. West***, 681 F. Supp. 1160 (E.D. Va. 1987).

During a confrontation between gang members on school grounds, a student reported that one of the other students in a group of five or six possessed a gun. The search of each of the five or six students in this group was reasonable in light of the potential danger to students and staff. The court also noted that California school officials are constitutionally required to maintain safe campuses. ***In re Alexander B.***, 270 Cal. Rptr. 342 (Cal. Ct. App. 1990).

Testing Students for Drugs

The United States Supreme Court upheld suspicionless drug testing of Customs agents involved in interdicting drugs or required to carry firearms even though that group of employees was known to be generally drug-free. Blood, breath and urine tests are searches under the Fourth Amendment that must be conducted reasonably. But reasonableness depends on the circumstances and is judged by balancing the importance of promoting governmental interests against the degree of intrusion on privacy. The testing of the customs agents was justified as a non-criminal administrative investigation to prevent bribery and drug-related misuse of firearms. The Court noted that the intrusiveness of the drug testing procedures was minimal and that the employees' privacy expectations were diminished because they were already required to submit to fitness and character examinations. ***National Treasury Employees Union v. Von Raab***, 489 U.S. 656, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989).

The Supreme Court also upheld the drug testing of railway employees involved in railroad accidents and safety violations even in the absence of individualized suspicion. The Court balanced the government's needs to protect safety and to detect and deter drug use against what it held to be a minimal intrusion upon employee privacy. The Court also noted that the privacy expectations of the railway employees was already diminished by their need to undergo periodic fitness examinations. ***Skinner v. Railway Labor Executives' Ass'n***, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989).

Prior to the *Skinner* and *Von Raab* decisions, a court invalidated the administration of a urine test for drugs to a student because of the questionable reliability and utility of the test and because the testing procedure, which included visual monitoring of the act of urination, was excessively intrusive and unjustified. ***Anable v. Ford***, 663 F. Supp. 149 (W.D. Ark. 1985).

Drug testing of students through urine tests as part of mandatory annual physical examinations was unreasonably intrusive on privacy in violation of the Fourth Amendment. The tests could not be justified by the numbers and percentages of students referred to drug counseling as compared with the total student body. ***Odenheim by Odenheim v. Carlstadt-East Rutherford Regional Sch. Dist.***, 510 A.2d 709 (N.J. Super. Ct. 1985).

Random urine testing of public school athletes was upheld. The court balanced the intrusion upon the student's privacy against the government's need to conduct the testing program. Among the factors considered were the need to prevent drug-related injuries, the fact that the athletes were role models for other students, the diminished expectation of privacy of athletes, the fact that urination was only monitored aurally, and the fact that the presence of drugs was punished by relatively minor sanctions of athletic suspension. ***Schaill by Kross v. Tippecanoe County Sch. Corp.***, 864 F.2d 1309 (7th Cir. 1988).

In a case decided after *Skinner* and *Von Raab*, a program to conduct urinalysis drug testing of students in grades seven through 12 who participate in extracurricular activities was invalidated because there were no extraordinary circumstances to justify suspicionless testing. The court noted the absence of evidence that students who participate in extracurricular activities were much more likely to use drugs than non-participants or that drug use by participants interferes more seriously with academics than does drug use by non-participants. The school's interest in testing students for drugs was much less than the governmental interest in testing railway and Customs employees in *Skinner* and *Von Raab*. ***Brooks v. East Chambers Consol. Indep. Sch. Dist.***, 730 F. Supp. 759 (S.D. Tex. 1989); *aff'd*, 930 F.2d 915 (5th Cir. 1991).

Canine Sniffing for Drugs

The United States Supreme Court has held that canine sniffing of luggage at an airport is not a search under the Fourth Amendment because the event is so limited in both the manner in which the information is obtained and in the content of the information revealed. The detention of the luggage for a canine-sniff, however, must be justified by reasonable suspicion that the luggage contains drugs and cannot last for an unreasonable period of time. A detention of luggage for ninety minutes was unreasonable. ***United States v. Place***, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983).

Use of marijuana sniffing dogs in school buildings was unconstitutional, particularly because the searches lacked individualized suspicion. However, a sniff by a school official might not be considered a search. ***Jones v. Latexo Indep. Sch. Dist.***, 499 F. Supp. 223 (E.D. Tex. 1980).

Canine sniffing of students was not a search under the Fourth Amendment. ***Doe v. Renfrow***, 475 F. Supp. 1012 (N.D. Ind. 1979), *aff'd* in part and remanded in part, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981).

A teacher's sniff of a student's hand to determine whether or not the odor of marijuana was present was not a search under the Fourth Amendment. Students have no reasonable expectation of

privacy with respect to the air surrounding their persons. ***Burnham v. West***, 681 F. Supp. 1160 (E.D. Va. 1987).

Student Lockers

The United States Supreme Court did not decide whether a student has a reasonable expectation of privacy in "lockers, desks, or other school property provided for the storage of school supplies." The Court noted that generally students must bring to school items of personal hygiene and are likely to carry with them personal items, such as letters, photographs and diaries. ***New Jersey v. T.L.O.***, 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).

An assistant principal of a public school had reasonable grounds for suspecting that a student's locker contained an alcoholic beverage. The scope of the search of the locker was reasonable and it was not excessively intrusive to reach into the pockets of the student's jacket. The court noted that the school's student handbook assured students that they may reasonably expect that their lockers will not be searched unless appropriate schools officials consider a search absolutely necessary to maintain the integrity of the school environment and protect other students. ***State v. Joseph T.***, 336 S.E.2d 728 (W. Va. 1985).

Students have a reasonable expectation of privacy as to their school lockers. The concurring judge noted that the school had not placed restrictions on the use of lockers and had not notified the students that use of the lockers would be subject to random or periodic inspection. ***In Interest of Dumas***, 515 A.2d 984 (Pa. Super. Ct. 1986).

Privacy as to one's locker depends on the school's locker search policy. If school administrators notify students of the possibility of a locker search in advance, then students have the opportunity to limit the school's intrusion by not keeping personal or intimate objects in their lockers. ***Commonwealth v. Carey***, 554 N.E.2d 1199 (Mass. 1990).

Under the Mississippi Constitution, students have a reasonable expectation of privacy in their school lockers. ***S.C. v. State***, 583 So. 2d 188 (Miss. 1991).

Several courts have applied the reasonable suspicion standard to locker searches without discussion. *See, e.g.*, ***State v. Brooks***, 718 P.2d 837 (Wash. Ct. App. 1986); ***R.D.L. v. State***, 499 So. 2d 31 (Fla. Dist. Ct. App. 1986); ***State v. Michael G.***, 748 P.2d 17 (N.M. Ct. App. 1987); *cert. denied*, 747 P.2d 922 (1987); ***Williams by Williams v. Ellington***, 936 F.2d 881 (6th Cir. 1991); ***Coronado v. State***, 806 S.W.2d 302 (Tex. Ct. App. 1991); *reh'g granted* (July 3, 1991).

Student Automobiles

The search of a student's car parked on school grounds was supported by reasonable suspicion. The court recognized the school's substantial interest in maintaining discipline on school grounds as well as in the classroom. ***Shamberg v. State***, 762 P.2d 488 (Alaska Ct. App. 1988).

A report from police to school officials that two students might be in possession of drugs led to a search of the students and their lockers. When no drugs were found, an unsuccessful search was conducted of a third student who had given one of the two students a ride to school. School officials searched the third student's car and discovered the drugs. The search was reasonable because the car "provided the means for transporting the drugs to school and for concealing the contraband." ***People in Interest of P.E.A.***, 754 P.2d 382 (Colo. 1988).

An informer reported that a student was selling drugs in the school parking lot. The search of the student uncovered $230 in small bills and a piece of paper with a telephone pager number on it. A search of the student's car in the school parking lot uncovered a pager and a notebook containing names with dollar amounts written next to the names. School officials then opened the car trunk, searched a locked briefcase, and discovered marijuana. The search of the car was reasonable because the informant had been reliable in the past and that the student was carrying a large sum of money in small bills and a pager. The court also noted that drug use "was a serious, ongoing problem at the school" and school officials had to act immediately before the car was removed from school grounds. The court emphasized that the *T.L.O.* reasonable suspicion requirement is not limited to just personal and locker searches. ***State v. Slattery***, 787 P.2d 932 (Wash. Ct. App. 1990).

Strip Searches

The United States Supreme Court did not expressly prohibit strip searches of public school students under the Fourth Amendment. The scope of any search, however, must be reasonable in light of the age and sex of the student and the nature of the alleged misconduct. ***New Jersey v. T.L.O.***, 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).

A strip search of an entire fifth grade class to uncover a missing $3.00 was unreasonable. The students were separated by sex, then required to strip down to their undergarments. When the money was not found, the students' desks, books, and coats were searched. The entire process lasted almost two hours and was not successful in uncovering the missing money. In determining reasonableness of the search,

the court considered such factors as the child's age, history and record in school, the seriousness and prevalence of the problem to which the search is directed, and the exigency requiring an immediate warrantless search. ***Bellnier v. Lund***, 438 F. Supp. 47 (N.D.N.Y. 1977).

While a school official's reasonable search of a student's person does not violate the student's Fourth Amendment rights, such authority by a school official would not justify a degrading body cavity search of a student in order to determine whether the student was in possession of contraband. ***Tarter v. Raybuck***, 742 F.2d 977 (6th Cir. 1984); *cert. denied*, 470 U.S. 1051 (1985).

Two fifth grade students were suspected of taking $6.00 that the class had accumulated to use on a class project. According to the plaintiff-student, her books and purse were searched and she was told to come to the front of the class and remove her shoes so that the teacher could feel her socks. The court held that there was reasonable grounds to suspect the plaintiff because the two students were the only ones in the classroom when the money was taken. One judge dissented, however, noting that the other students in the class had participated in the search, the suspects were required to remove their shoes and be searched in front of the class, and this misconduct only involved the loss of six dollars. ***Wynn by and through Wynn v. Board of Educ. of Vestavia Hills***, 508 So. 2d 1170 (Ala. 1987)

A student informant reported drug use by two fellow students. When the principal confronted the students with his suspicions, one of the students produced a small vial containing a volatile substance. Because the vial did not match the description given by the informant, the principal searched the students' lockers, books, and purses. When no drugs were found, the assistant principal, in the presence of a secretary (both of whom were female), demanded that one of the girls remove her T-shirt and lower her jeans. The court held that the search was reasonable. ***Williams by Williams v. Ellington***, 936 F.2d 881 (6th Cir. 1991).

Police Involvement

The United States Supreme Court did not decide whether the reasonable suspicion standard or the probable cause standard would apply to searches conducted by school officials "in conjunction with or at the behest of law enforcement agencies." ***New Jersey v. T.L.O.***, 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).

The reasonable suspicion requirement was applied when a sheriff, called to school on another matter, conducted a search of a student. The court refused to impose the warrant and probable cause requirements because they would not serve the interests of the school in preserving swift and informal disciplinary procedures. In addition, the deputy had exercised only a limited role, had not developed the facts of the investigation, and had not required that the student be detained and searched. ***Martens by and through Martens v. District No. 220 Bd. of Educ.***, 620 F. Supp. 29 (N.D. Ill. 1985).

The reasonable suspicion standard was applied although a school's police liaison officer was involved in the search of a student. The search was not conducted at the behest of the law enforcement agency, and the liaison officer's involvement was limited to a pat-down search after evidence had been found in the student's possession. ***Cason v. Cook***, 810 F.2d 188 (8th Cir. 7(1987), *cert. denied*, 482 U.S. 930 (1987).

A search of a student by a resource officer, at the request of a police investigator, was not permitted under the school search exception. Even if the resource officer's dual role as school official and law enforcement officer were not considered, because the search was at the behest of a police officer, it must be supported by probable cause. ***F.P. v. State***, 528 So. 2d 1253 (Fla. Dist. Ct. App. 1988).

A police officer told an assistant principal of an informant's report that two students were planning to sell marijuana at school. The court held that the school officials were not police agents, and the reasonable suspicion standard applied to the school search, because the police officer did not request the searches, did not participate in the searches, and had no knowledge of the investigation. Even though the police officer supplied information to the principal with the intent of initiating the search and the officer was present on school premises during the investigation, the school officials were not police agents. ***People in Interest of P.E.A.***, 754 P.2d 382 (Colo. 1988).

The reasonable suspicion standard applies when school officials conduct the search in question in conjunction with, but not at the behest of, police officers who are assigned to the school. ***Coronado v. State***, 806 S.W.2d 302 (Tex. Ct. App. 1991); *reh'g granted*, (July 6, 1991).

Consent Searches

Although a student turned over a weapon to an assistant principal during a search, the discovery of the weapon was the product of and was tainted by the illegality of the unlawful search and was not a voluntary surrender or abandonment. The search of student, merely because he was a friend of a fellow

student who had fainted from drug use, was not based on reasonable suspicion. ***R.J.M. v. State***, 456 So. 2d 584 (Fla. Dist. Ct. App. 1984).

A school official was not required to inform a student of his right to remain silent prior to obtaining the student's consent to be searched. After being informed that a student was in possession of drugs, the principal confronted the student, who responded, "You can search me if you want to." The student's consent was valid because it was volunteered. ***In re Corey L.***, 250 Cal. Rptr. 359 (Cal. 1988).

A student was searched by an assistant principal who had reasonable suspicion that the student had been selling drugs from his car, parked on school grounds. When the search uncovered a set of car keys, the student volunteered to take the principal to the car. The student then opened the trunk and consented to its search. ***Coronado v. State***, 806 S.W.2d 302 (Tex. Ct. App. 1991); *reh'g granted*, (July 3, 1991).

Exclusionary Rule

The United States Supreme Court has not decided whether the exclusionary rule is the appropriate remedy for violations of the Fourth Amendment by school officials. ***New Jersey v. T.L.O.***, 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).

The United States Supreme Court has, however, permitted the use of illegally seized evidence for grand jury questioning, in civil tax litigation, and in deportation proceedings. The Court uses a balancing test to determine if the deterrence value of applying the exclusionary rule outweighed the social costs and administrative disruption. For example, in the deportation proceedings case, the Supreme Court found that the Immigration and Naturalization Service had its own scheme for deterring Fourth Amendment violations by its agents and that it was unlikely that the exclusionary rule would deter INS agents. Also, applying the exclusionary rule in proceedings that are intended not to punish past transgressions, but to prevent continued illegal immigration, would require the courts to close their eyes to ongoing violations of the immigration laws. ***Immigration and Naturalization Serv. v. Lopez-Mendoza***, 468 U.S. 1032, 104 S. Ct. 3479, 82 L. Ed. 2d 778 (1984).

Prior to T.L.O., some courts had said that the exclusionary rule does not apply when evidence is seized by school officials. ***Bellnier v. Lund***, 438 F. Supp. 47 (N.D.N.Y. 1977); ***United States v. Coles***, 302 F. Supp. 99 (D. Me. 1969).

The California Supreme Court determined that the exclusionary rule is the only appropriate remedy when evidence is sought to be admitted in a juvenile or criminal prosecution. The court explained that the exclusionary rule is intended to preserve the integrity of the judicial system in addition to deterring police misconduct. ***In re William G.***, 221 Cal. Rptr. 118, 709 P.2d 1287 (Cal. 1985).

Several courts have applied the exclusionary remedy to illegal school searches in juvenile and criminal proceedings without discussing the appropriateness of the remedy. ***T.J. v. State***, 538 So. 2d 1320 (Fla. Dist. Ct. App. 1989); ***Matter of Appeal in Pima County Juvenile Action No. 80484-1***, 733 P.2d 316 (Ariz. Ct. App. 1987); ***In Interest of Dumas***, 515 A.2d 984 (Pa. Super. Ct. 1986).

Table of Cases

Alexander B., *In re*/5
Anable v. Ford/16
Bellnier v. Lund/18, 19
Brooks v. East Chambers Consol. Indep. Sch. Dist./16
Burnham v. West/15, 17
Cales v. Howell Pub. Schs./14
Cason v. Cook/18
Coffman v. State/15
Commonwealth v. Carey/15, 17
Corey L., *In re*/19
Coronado v. State/17, 18, 19
Doe v. Renfrow/16
Dumas, *In Interest of*/14, 17, 19
Frederick B., *In re*/14
F.P. v. State/18
Immigration and Naturalization Service v. Lopez-Mendoza/19
Jones v. Latexo Indep. Sch. Dist./16
Kuehn v. Renton Sch. Dist. No. 403/15
Martens by and through Martens v. District No. 220 Bd. of Educ./18
Michigan Dep't of State Police v. Sitz/15
National Treasury Employees Union v. Von Raab/16
New Jersey v. T.L.O./14, 15, 17, 18, 19
Odenheim by Odenheim v. Carlstadt-East Rutherford Regional Sch. Dist./16
P.E.A., *People in Interest of*/17, 18
Pima County Juvenile Action No. 80484-1, *Matter of Appeal in*/14, 19
R.D.L. v. State/17
R.J.M. v. State/15, 19
S.C. v. State/17
Schaill by Kross v. Tippecanoe County Sch. Corp./16
Shamberg v. State/17
Skinner v. Railway Labor Executives' Ass'n/16
State v. Brooks/14, 17
State v. Joseph T./14, 17
State v. Michael G./17
State v. Slattery/17
Tarter v. Raybuck/18
T.A. O'B. v. State/14
T.J. v. State/14, 19
United States v. Coles/19
United States v. Place/16
Webb v. McCullough/15
Williams by Williams v. Ellington/15, 17, 18
William G., *In re*/14, 19
Wynn by and through Wynn v. Board of Educ. of Vestavia Hills/18

Case Citations

STUDENT SUSPENSIONS AND EXPULSIONS

THIRTEENTH Series, Number 4

Prepared by Robert A. Perrotta, Academic Dean
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Contents

General 22

Faulty Notice 22

Inadequate Hearing 23

Confrontation and Cross-Examination 24

Impartial Hearing 25

Evidentiary Issues 26

Requirement of Miranda Warnings 28

Basis of Suspension or Expulsion 29

Suspension or Expulsion as Appropriate Punishment 31

Table of Cases 34

General*

Students have property and liberty interests to a public education that are protected by the Due Process Clause of the Fourteenth Amendment. Students suspended for less than ten days must still be afforded minimum due process rights which include oral or written notice of the charges against them and an opportunity to present their side to the controversy. Students facing suspensions of more than ten days will be afforded more formal procedural safeguards. ***Goss* v. *Lopez***, 419 U.S. 565, 95 S. Ct. 729, 42 L.Ed. 2d 725 (1975).

Faulty Notice

A student was suspended for the remainder of the school year after being caught carrying a switchblade knife to school in violation of school rules. His parents contended that the student's procedural due process rights were violated at the school board hearing because they were not given adequate notice as to the type of hearing, the charges, the names of the student's accusers, a summary of their expected testimony, the right to be represented by counsel, and the right to confront and cross-examine witnesses. The court held that the notice given was adequate for the student had the opportunity to present his side of the story, the parents had the opportunity to fully participate at the school board hearing, and the student admitted to carrying the knife to school. ***McClain* v. *Lafayette County Bd. of Educ.***, 673 F.2d 106 (5th Cir. 1982).

A student appealed a three day suspension claiming that he was only given advance notice that he was to be suspended for a single fight. The notice did not inform him that three other fights in which he was involved were also to be considered in arriving at the punishment. The court ruled that all procedural due process requirements were followed in that the student and his parents were given the specifics surrounding each fight with the opportunity to explain their version of the facts. Furthermore, the student and his parents were given an appeal hearing before the superintendent of schools at which counsel was present. ***Walker* v. *Bradley***, 320 N.W.2d 900 (Neb. 1982).

Based on repeated misbehavior, a student was suspended for ten days. Subsequently, as a result of a full board of education hearing, he was suspended for the remainder of the year. His parents claimed that they were not fully appraised of the nature of the hearing, and they were not given a list of witnesses and a summary of their testimony before the hearing. The court ruled that informal give-and-take sessions between the student and principal supported the short-term suspension. Furthermore, procedural due process requirements had been satisfied since the parents received two letters informing them of the basis of the suspension and the date of a hearing at which their son's status as a student would be determined, received a list of statements of witnesses at the beginning of the hearing with the opportunity to cross-examine these witnesses during the hearing, and were presented with no surprise testimony for which they were unprepared to defend. ***Keough* v. *Tate County Bd. of Educ.***, 748 F.2d 1077 (5th Cir. 1984).

As a result of a police surveillance operation, several students were arrested on school grounds for drug use. Based on police reports of the arrests, school administrators held informal discussions with students informing them that instead of their attending classes, they and their parents were to report to a suspension hearing the following day. Plaintiffs decided to retain counsel and by agreement the hearing was postponed one day. At the conclusion of the hearing, students were suspended for ten days. Plaintiffs claimed that they were denied their due process rights since they were suspended one day before the hearing occurred. The court held that adequate notice was given to plaintiffs of hearings to be held the following day. It was the students' choice to postpone the hearings so that they would be afforded the greater protection of adversarial proceedings. Thus, such a delay did not violate their due process rights. ***White* v. *Salisbury Township Sch. Dist.***, 588 F. Supp. 608 (E.D. Pa 1984.).

A student was expelled for stealing money from two teachers. At the parents' request, the School District conducted a formal hearing in June at which it voted to expel the student. One month later, the District formally notified the student and his parents of its decision. The court held that the one month delay in communicating the decision of the District to expel did not *per se* render the adjudication invalid. ***Norristown Area Sch. Dist.* v. *A.V. by and through V.V.***, 495 A.2d 990 (Pa. Commw. Ct. 1985).

A group of high school students admitted to vandalizing some grade school athletic fields. In accordance with the disciplinary policies set forth in the student handbook, the principal suspended the students for three days. The principal notified the students in his office of the suspensions and sent a

Suspension and expulsion of handicapped students is beyond the scope of this series of case citations. *See Honig* v. *Doe, 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988) and its progeny.

letter to their parents informing them of the suspensions. The parents filed suit alleging that the suspensions violated the students' due process rights. The court held that the students waived their right to a hearing by admitting their involvement in the vandalism. Consequently, their due process rights were satisfied when they received notice. Furthermore, the district was well within its rights to impose disciplinary sanctions without the permission or approval of the parents. ***Boster v. Philpot***, 645 F. Supp. 798 (D. Kan. 1986).

A student was suspended for three days for fighting on school property. The principal scheduled an informal hearing at which school authorities decided to suspend the student four additional days. For a suspension of more than three days, Pennsylvania law requires that parents receive written notice of the reasons for the suspension before an informal hearing takes place. Since the parents received only oral notice of the hearing, the District did not comply with statutory provisions, and the additional four day suspension was held to be invalid. ***Mifflin County Sch. Dist. v. Stewart by Stewart***, 503 A.2d 1012 (Pa. Commw. Ct. 1986).

Pursuant to a vote of the board of education, a student was expelled for "gross misconduct." The parents claimed that notice of the expulsion hearing was inadequate since it was hand delivered to one parent instead of being sent by certified mail to both parents as required by Illinois statute. Furthermore, the notice did not make reference to specific incidents or school rules under which the student was to be punished. The court held that under the circumstances, the hand delivered notice was sufficient to vest the board with jurisdiction. Also, given the fact that the parents were diligently informed of the cumulative pattern of their son's misbehavior, the notice was sufficiently specific to provide proper procedural due process. ***Stratton v. Wenona Community Unit Dist. No. 1***, 551 N.E.2d 640 (Ill. 1990).

As a result of refusing to obey a direct order of an instructor, a student was suspended from school for three days for insubordination. Before being suspended, the student was called into the assistant principal's office where he admitted to the charges and failed to explain his actions. His parents were notified by telephone that their son would be suspended for his insubordination. The court held that the plaintiff was afforded his due process rights since he was made aware of the charges against him shortly after the incident and was given the opportunity to explain the behavior which gave rise to the suspension. ***Wayne County Bd. of Educ. v. Tyre***, 404 S.E.2d 809 (Ga Ct. App. 1991).

Inadequate Hearing

Non-resident high school students challenged an Ohio High School Athletic Association rule which prohibits students whose parents live in another state from participating in interscholastic athletic competition. Among other charges, the students claimed that the rule denies them due process of law. The court admitted that if the rule imposed more than ineligibility from participation in interscholastic competition, then due process might apply. A student is entitled to a hearing before he can be suspended from school, thus depriving him of participation in classes, extracurricular activities, and athletics. However, participation in athletics by itself is not a separate property or liberty interest for which due process applies. ***Menke v. Ohio High Sch. Athletic Ass'n***, 441 N.E.2d 620 (Ohio Ct. App. 1981).

As a result of discussions with the dean of students, plaintiff produced a sheathed knife which he was carrying in violation of a village ordinance. Plaintiff was suspended for ten days. No notice nor formal hearing was given the plaintiff before the suspension. At the request of plaintiff's parents, a hearing did take place at which the parents were not given the opportunity to cross-examine witnesses or permission to record the proceedings. The only evidence presented was the dean of student's written report of the seizure of the weapon from the plaintiff. The court held that even a mere informal encounter between a student and the school authority is sufficient for a suspension of up to ten days. Here the informal post-suspension hearing did not violate plaintiff's due process rights. ***Reineman v. Valley View Community Sch. Dist. # 365 U***, 527 F. Supp. 661 (N.D. Ill. 1981).

Acts of vandalism, unlawful entry, theft, and destruction of property were unquestionably committed by the plaintiff. As a result of a hearing which fully complied with due process requirements for short term suspensions, the initial penalty of suspension was changed to expulsion since the student was not permitted to return to school. The court held that the defendant school superintendent violated the student's due process rights by failing to either cap the suspension period and request a board hearing at which expulsion would be considered or end the suspension and request an immediate hearing. ***Darby v. Schoo***, 544 F. Supp. 428 (W.D. Mich. 1982).

Plaintiffs were suspended from school for six days for fighting at a high school basketball game. The court noted that because suspension from school involves a protected interest, a student is entitled to notice and a hearing. However, for suspensions under ten days, only rudimentary precautions against unfair or mistaken findings must be provided. A meeting

in the principals office, a hearing before a panel, and a review by the school superintendent clearly satisfied the rudimentary precautions for a six day suspension required by due process. The opportunity to secure counsel, to confront and cross-examine witnesses, or to call witnesses is not required. ***Davis by Davis v. Churchill County Sch. Bd. of Trustees***, 616 F. Supp 1310 (D. Nev. 1985), remanded, 823 F.2d 554 (9th Cir. 1987).

Plaintiff was suspended from school from the date of an incident of violent behavior until the next school board meeting—a total of 35 days. Virginia law allowed suspensions to remain in effect for 30 days pending a decision by a school board. The court held that the necessity of a prompt hearing is a constitutional prerequisite despite Virginia's statutory provisions. Consequently, the School Board was under the obligation to provide a hearing within a reasonable period of time after the date of suspension. A reasonable time was construed not to exceed 72 hours. ***Doe v. Rockingham County Sch. Bd.***, 658 F. Supp. 403 (W.D. Va. 1987).

A student was suspended for 90 days for misconduct on school grounds. He claimed that the suspension violated his right to due process based on the inadequacy of his hearing. The court disagreed. It found that the student was provided with written notice of the charges against him, was represented by counsel, was able to confront and cross-examine witnesses, and was allowed to present evidence in support of his case. ***Sykes v. Sweeney***, 638 F. Supp. 274 (E.D. Mo. 1986).

A student asserted that she was denied procedural due process when she was initially suspended from school for three days for refusing to submit to a paddling for misconduct and later was suspended indefinitely until she agreed to submit to the paddling. The court found that even though the school board allowed the student to return to school by the eleventh day on condition that she remain in isolation for the remainder of the school term, the student may still be entitled to broader protections. It reasoned that in-school isolation could well constitute an exclusion from the educational process equivalent to a student being barred from school. If a student was in fact barred from the educational process for more than ten days even though physically present in school, more formal hearing procedures would be required to satisfy due process rights. ***Cole by and through Cole v. Newton Special Mun. Separate Sch. Dist.***, 676 F. Supp. 749 (S.D. Miss. 1987), aff'd, 853 F.2d 924 (5th Cir. 1988).

A student challenged a 60-day athletic suspension in addition to a tenday academic suspension for drinking beer and smoking marijuana at the school's radio station. The court held that the student received due process, *as required by Goss*. Furthermore, the court stated that the student was not entitled to greater due process protections based on the additional 60-day athletic suspension since participation in extra-curricular activities under New Jersey law is not a fundamental right but a privilege. ***Palmer by Palmer v. Merluzzi***, 868 F.2d 90 (3d Cir. 1989).

An eighth grade student threatened several other students with a knife. His parents were notified that a hearing would be held to determine whether the student should be expelled. As a result of the hearing, the student was expelled with the right to petition for reinstatement 25 days later. The parents appealed to the school board and were granted a hearing before an appellate hearing officer. At the hearing at which the student was represented by counsel, the expulsion was affirmed. A report of the proceedings was sent to the full school board, and the decision was unanimously affirmed. On appeal, the federal district court found that the student's due process rights were satisfied by the informal hearing before the principal, the written notice to the parents informing them of the hearing before an official representative of the superintendent, the right to counsel, and a hearing before the full school board. ***Draper v. Columbus Pub. Sch.***, 760 F. Supp. 131 (S.D. Ohio 1991).

As a result of violating the school's drug policy, a student was suspended for 60 days which was later reduced by the school board to 30 days. The court found that the school district complied with procedural due process requirements when the principal discussed the offense with the student for 30 to 40 minutes; the student had a hearing before the principal two days later; the student had a second hearing after his parents received notice of an indefinite suspension; the student appealed the results of the second hearing to the assistant superintendent who set the student's suspension at 60 days; the student appealed to the superintendent of schools who affirmed the suspension; and, the student appealed to the board of education at which time he was able to introduce witnesses, to cross-examine, and to argue. ***Salazar v. Luty***, 761 F. Supp. 45 (S.D. Tex. 1991).

Confrontation and Cross-Examination

A student was suspended for eight school weeks after admitting to possession of marijuana and drug paraphernalia. He denied selling or using drugs on campus. At his hearing, the student requested the names of the buyers who testified against him. Three statements from students accusing him of selling and using illegal drugs were read; however, their identities were not disclosed. The student claimed that his

suspension was based on statements of students who he did not have the opportunity to confront and cross-examine. The court held that it would not escalate the formality of the suspension process by imposing technicalities of criminal procedure on school suspension cases. Under the present circumstances, the summary statements of the three witnesses were more than sufficient to uphold the student's due process rights. ***Brewer by Dreyfus v. Austin Indep. Sch. Dist.***, 779 F.2d 260 (5th Cir. 1985).

A student was expelled for selling marijuana on school grounds. At his hearing, he was not permitted to cross-examine two students upon whose testimony the expulsion was based. The student claimed that his inability to confront and cross-examine constituted a denial of due process of law. The court held that the student did not have the right to know the identity of his accusers and to cross-examine them. It reasoned that school administrators had the opportunity to assess the credibility of the student witnesses and disclosure of the identities of these witnesses may result in reprisals against them. ***Newsome v. Batavia Local Sch. Dist.***, 842 F.2d 920 (6th Cir. 1988).

A student was suspended for ten days based on information given to an assistant principal that another student offered to sell him cocaine on school grounds. The student claimed that his rights to due process were violated since he was not permitted to cross-examine the informant at the hearing. The court held that the student did not have a right of cross-examination nor to know the identity of the informant. ***Paredes by Koppenhoefer v. Curtis***, 864 F.2d 426 (6th Cir. 1988).

A student appealed a three-day suspension for hitting another student in the face. The court held that the assistant principal's refusal to hear certain witnesses on the issue before suspending the student did not *per se* violate the student's rights to due process. The student was afforded an opportunity to cure any potential due process violations in subsequent hearings before the superintendent and the board of education. ***Rossman v. Conran***, 572 N.E.2d 728 (Ohio Ct. App. 1988).

A student was suspended from school for the spring semester for her involvement in drug sales on the campus. She claimed that she was denied due process of law because she was not given a complete list of witnesses against her and was not afforded the opportunity to cross-examine all of the witnesses. The court held that confrontation and cross-examination are not an absolute necessity to fulfill the requirements of due process. Confrontation rights will be upheld in situations where sanctions were imposed solely on the basis of hearsay statements of students. ***Jones v. Board of Trustees of Pascagoula Mun. Separate Sch. Dist.***, 524 So. 2d 968 (Miss. 1988).

A student was expelled for bringing an automatic weapon and ammunition to school. His parents claimed that their son was denied his rights to due process since the board of education failed to permit them to present witnesses or to confront or examine witnesses. The court held that there was no violation of due process since the parents were permitted to speak on their son's behalf, were invited to bring any witnesses they felt would be helpful to their case, and participated in several dialogues with board members and their son's chief accuser, the school's principal. ***Carey on behalf of Carey v. Maine Sch. Admin. Dist. No. 17***, 754 F. Supp. 906 (D. Me. 1990).

Impartial Hearing

A student who was suspended for eight weeks for involvement in drug sales on campus was not denied his right to a hearing before an impartial tribunal solely because the school administrator who initiated and investigated the charges also acted as a voting member of the hearing board. The student would have to show that the school administrator's involvement created a bias "such as to preclude his affording the student an impartial hearing." ***Brewer by Dreyfus v. Austin Indep. Sch. Dist.***, 779 F.2d 260 (5th Cir. 1985).

A student was expelled from middle school for possession of marijuana. There was no dispute as to the student's possession of a controlled substance. However, his parents contend that the student's right to due process was violated since the hearing was held before an employee of the School District. The court held that there is no fundamental due process right to a hearing officer who is not employed by the district. The right is only to a hearing officer who is fair and impartial. ***Rucker v. Colonial Sch. Dist.***, 517 A.2d 703 (Del. Super. Ct. 1986).

A student was suspended for 30 days for gaining unauthorized access into the school district's main computer. His parents claimed that the student's due process rights were violated when the Board of Education impermissibly commingled prosecutorial and advisory functions at the student's suspension hearing. The court held that an adversarial/prosecutorial posture which creates even the appearance of impropriety and denial of a fair hearing is unacceptable. Thus, when the legal staff of the Board of Education consists of two attorneys, one which supervises the other, and when one acts as advisor to the Board while the other acts as prosecutor for the Board, an impermissible commingling has occurred. ***Pittsburgh Bd. of Pub. Educ. v. MJN by NJN***, 524 A.2d 1385 (Pa. Commw. Ct. 1987).

A student was suspended from school for three days for consuming alcohol while on a class trip. His parents claimed that the school board hearing held to consider the suspension was constitutionally defective because the board's attorney, the principal, and the superintendent performed dual roles in the hearing process. The board's attorney served as prosecutor at the hearing and also advised the board during its closed session deliberations. The principal and superintendent who served as witnesses against the student were permitted into the board's closed deliberations while the student and his counsel were excluded. The court held that combining an advisory function with a hearing participant's prosecutorial or testimonial function does not *per se* create an unacceptable risk of bias. ***Lamb v. Panhandle Community Unit Sch. Dist. No. 2***, 826 F.2d 526 (7th Cir. 1987).

Students were suspended and later expelled from school for damaging school property. Plaintiffs objected to the fact that the superintendent acted as both investigator and hearing officer. Furthermore, neither the plaintiffs nor their counsel were present during an executive session attended by the superintendent at which time plaintiffs' appeal of their expulsions was discussed. The court stated that an investigating officer is not *per se* disqualified from conducting a hearing absent a showing of impartiality. However, in the present case, the superintendent's contact with board members before he decided to expel the plaintiffs, coupled with the special executive session held during plaintiffs' appeal before the board raised the possibility that the fairness of the procedures was tainted. ***Shank v. Hegele***, 521 N.E.2d 9 (Ohio C.P. Ct. 1987).

Evidentiary Issues

The school board appealed a decision that it had wrongly suspended a tenth grade student for being intoxicated on school grounds. The U.S. Supreme Court reversed rulings by the district court and the Eighth Circuit Court of Appeals holding that it was plain error for the lower courts to substitute their own construction of school board rules for that of the school board. Injunctive relief under 42 U.S.C. 1983 does not grant a right to relitigate in federal court evidentiary questions based on school disciplinary proceedings or the proper construction of school regulations. ***Board of Educ. Rogers, Ark. v. McCluskey***, 458 U.S. 966, 102 S. Ct. 3469, 73 L. Ed. 2d 1273 (1982).

A student was expelled for his involvement in a fight on school grounds. The board based the expulsion on written statements by witnesses and on the vice-principal's report. The court held that where evidence is in sharp dispute, it is improper for a board to rely solely on written statements absent a showing that the witnesses were unavailable to testify first hand or that their in-person testimony would expose them to a significant risk of harm. ***John A. v. San Bernardino City Unified Sch. Dist.***, 33 Cal. 3d 301, 187 Cal. Rptr. 472, 654 P.2d 242 (Cal. 1982).

The School District appealed an order reversing a student expulsion on the ground that hearsay testimony was not admitted into evidence. The Court of Appeals affirmed the decision of the trial court. In reaching its conclusion, it held that absent any allegation of bias, hearsay statements have sufficient probative value upon which to base a decision. ***Racine Unified Sch. Dist. v. Thompson***, 321 N.W.2d 334 (Wis. Ct. App. 1982).

A student was expelled for carrying a boxed commemorative knife to school. The School Board found that this action constituted a breach of a board rule mandating expulsion for carrying a weapon in school. The court found that the expulsion was not supported by substantial, competent evidence. The commemorative, boxed knife did not fit into any of the descriptive requirements of "weapon" as defined in the Board's rules. ***C.J. v. School Bd. of Broward County***, 438 So. 2d 87 (Fla. Dist. Ct. App. 1983).

A student was expelled for possession of a pill containing caffeine and ephedrine, two non-controlled substances. She claimed that the expulsion was an unreasonable abuse of discretion by the board. The trial court agreed. The Court of Appeals reversed stating that the decision of the school board had a strong foundation in light of the potentially serious consequences of distributing any form of pills in the restricted environment of a school. ***Wilson on behalf of Wilson v. Collinsville Community Unit Sch. Dist. No. 10***, 451 N.E.2d 939 (Ill. App. Ct. 1983).

A student was found intoxicated by local police on school grounds after a football game. As a result of his being issued a citation by the police, the student was suspended from school for ten days. At a hearing conducted by the board of education, a copy of the citation was introduced into evidence. Based on this evidence, the student was expelled from school until the end of the marking period—a period of 24 days. On appeal, the parents claimed that the board should not have based its decision on the citation. The court held that the citation was clearly relevant to the issue and of probative value. Thus, in the absence of any exclusionary rule of law, it was properly admitted into evidence. ***Appeal of McClellan***, 475 A.2d 867 (Pa. Commw. Ct. 1984).

A mother and son brought suit against the School Board for wrongful expulsion from school. The defendant school moved to have the suit dismissed for it failed to state a cause of action. The court held

that all well-pleaded allegations of fact are accepted as true and if the allegations state a valid cause of action in any part, the petitioners should be afforded the opportunity to present their evidence. ***Jenkins v. Ouachita Parish School Bd.***, 459 So. 2d 143 (La. Ct. App. 1984).

A student was expelled from school for a shooting incident, off school grounds, in which he was involved. The student claimed that he was expelled on only a charge and not a conviction. The court held that the expulsion was based on a hearing in which plaintiff's entire disciplinary history was carefully considered. Furthermore, the court noted that the evidence showed that the plaintiff's presence would cause a potentially explosive situation in the school. Since there was sufficient evidence to support the plaintiff's expulsion by the school board, the court refused to render a contrary judgment. ***Smith v. Little Rock Sch. Dist.***, 582 F. Supp. 159 (E.D. Ark. 1984).

Two students were expelled for drinking alcohol while participating as cheerleaders in a football game. The trial court overturned the order of expulsion issued by the school board and modified the order to attend a local mental health program to attend a counseling program within the school. The school board appealed the decision. On appeal, the court held that the trial court did not abuse its discretion in modifying the orders of the board. Since there was no record of the proceedings before the school board which lead to the expulsion, the trial court had the right to hear the appeal *de novo* with the discretion to modify the penalty based on the evidence presented before the court. ***Tomlinson by Tomlinson v. Pleasant Valley Sch. Dist.***, 479 A.2d 1169 (Pa. Commw. Ct. 1984).

A student was expelled under a school board rule which prohibited possession, sale, or use of substances that are held out or represented to be an illegal or controlled substance. On appeal, the court held that no evidence was introduced to show that appellant either in fact sold a controlled substance or that she held out the pills in question to be a controlled substance when she sold them. Consequently, the evidence was insufficient upon which to base a finding of violation of the School Board rule. ***Adams v. School Bd. of Brevard County***, 470 So. 2d 760 (Fla. Dist. Ct. App. 1985).

A student was expelled for the purchase and resale of a controlled substance. Evidence included testimony that he admitted the offense to the dean of students and signed a sworn statement to the same effect. The student claimed that evidence was insufficient to sustain an expulsion for the pills purported to be a controlled substance were in fact caffeine. The court disagreed. It found that the evidence showed that the student represented the pills to be a controlled substance when offered for sale. Thus, under School Board rules, the evidence was sufficient to sustain the expulsion. ***Jones v. Brevard County Sch. Bd.***, 470 So. 2d 760 (Fla. Dist. Ct. App. 1985).

The School District appealed an order of the trial court reversing the board's decision to expel a student for possession and distribution of a controlled substance. The court agreed with the findings of the trial court that a decision to expel the student was not supported by substantial evidence as set forth in the record of the board's hearing. ***Big Spring School Dist. v. Hoffman by Hershey***, 489 A.2d 998 (Pa. Commw. Ct. 1985).

A student was expelled based upon a finding that he was guilty of possessing and selling pills represented to be a controlled substance on campus in violation of a school board rule prohibiting such activity. An appellate court held that the evidence was insufficient to support the School Board's actions for no evidence was introduced to prove that the student represented the pills to be anything other than legally obtainable caffeine. ***McEntire v. Brevard County Sch. Bd.***, 471 So. 2d 1287 (Fla. Dist. Ct. App. 1985).

A student was expelled from school after he admitted to smoking marijuana on school grounds. The student argued that his expulsion was unwarranted because it was based on only one factor and that other evidence, such as his previous record and his good standing in school, was not considered. The court held that the evidence was sufficient to warrant the expulsion since the state statute did not mandate that any other mitigating factors be taken into consideration. ***Forrest v. School City of Hobart***, 498 N.E.2d 14 (Ind. Ct. App. 1986).

A student was suspended for ten days for making a vulgar gesture to a teacher off school grounds and after school hours. The court held that the record failed to show a connection between the student's gesture directed at his teacher and the school's interest in maintaining the proper and orderly operation of its activities. Consequently, the student's actions were insufficient to support his suspension by the board. ***Klein v. Smith***, 635 F. Supp. 1440 (D. Me. 1986).

A high school champion wrestler was accused of breach of discipline, assault, and emotional injury to a female student. As a result of a hearing, he was declared ineligible to compete on the wrestling team. The student sued for reinstatement claiming that the board relied on hearsay evidence and that the evidence presented against him was insufficient to uphold the suspension. The court found that the evidence presented at a five to six hour hearing at which

the student was represented by counsel and was afforded the opportunity to confront and cross-examine witnesses clearly sustained the conclusion of the board. Furthermore, while hearsay testimony was admitted into evidence, due process does not require that courtroom standards of evidence be used in school administrative hearings. Absent direct contradictory evidence, hearsay could be relied upon. ***Brands v. Sheldon Community Sch.***, 671 F. Supp. 627 (N.D. Iowa 1987).

A student was suspended for drug dealing on school grounds. She claimed that evidence of her alleged drug dealings was conflicting and insufficient to uphold her suspension. The court disagreed holding that even though the evidence against the student was conflicting, the Board's decision was in fact supported by sufficient evidence. ***Jones v. Board of Trustees of Pascagoula Mun. Separate Sch. Dist.***, 524 So. 2d 968 (Miss. 1988).

An eighth-grade student was suspended for violating the assault provision of the district's disciplinary code. He challenged the decision claiming that there was no substantial evidence to support the school board's finding that he committed the assault. The court disagreed. It held that the decision by the board was supported by competent and substantial evidence. The evidence showed that the student participated in the fight, wore a spiked bracelet during the fight, and injured the other participant with the spiked bracelet. Furthermore, the evidence showed that the student was not placed in a defensive position but rather had many opportunities to avoid the confrontation. The board, acting within its discretion, chose to believe that the student attempted to harm another. The court refused to substitute its discretion for that properly exercised by the board. ***Reasoner by Reasoner v. Meyer***, 766 S.W.2d 161 (Mo. App. 1989).

The School District appealed an order reversing its suspension of a student for allegedly possessing a weapon on school grounds. The trial court held that the board had acted unreasonable since its decision was not based on competent and substantial evidence. On appeal, the court pointed out that an appellate court reviews the findings of the administrative agency, not the judgment of the trial court. Furthermore, a court may reverse an administrative decision only if no substantial and competent evidence supports its findings. Evidence is competent if it is relevant and can establish the fact at issue. The court held that the student's admission that he brought a knife to school was sufficient to trigger the District's use of its discretionary power in suspending the student. ***Consolidated Sch. Dist. No. 2 v. King by Dresselhaus***, 786 S.W.2d. 217 (Mo. App. 1990).

Requirement of *Miranda* Warnings

A student challenged his expulsion from the school for using marijuana on school premises. He claimed that he was denied due process because he was not told that he could remain silent and his parents were neither notified nor allowed to be present during his questioning. The court held that the questioning by the principal to determine whether the student should be suspended or expelled does not constitute a "custodial interrogation" requiring *Miranda* warnings. Consequently, the student had no right to advice that he could remain silent nor did he have a right to have his parents present while he was questioned. ***Boynton v. Casey***, 543 F. Supp. 995 (D. Me. 1982).

The school district appealed a trial court's injunction preventing the enforcement of an expulsion of a student for the sale of marijuana on school grounds. The district claimed that the trial court erred in excluding evidence in which the student admitted that he intended to sell marijuana. The trial court focused on the school district's failure to give *Miranda* warnings before questioning the student. An appellate court held that the *Miranda* rule is a procedural safeguard designed to protect an individual's Fifth Amendment right against self-incrimination in criminal prosecutions. The rule does not apply in a civil hearing convened to determine the proper disciplinary action in a school setting. ***Birdsey v. Grand Blanc Community Schs.***, 344 N.W.2d 342 (Mich. Ct. App. 1983).

At the request of the police, a student voluntarily reported to the principal's office where he was questioned by school officials in the presence of two police officers. Neither of the officers participated in the questioning. As a result of the questioning, the student confessed to vandalism for which he was later convicted. The student claimed that he was entitled to *Miranda* warnings before being questioned by the principal. The court held that merely because the student was questioned by the principal in the presence of the police did not render it "a custodial interrogation" so as to require *Miranda* warnings. ***In re Drolshagen***, 310 S.E.2d 927 (S.C. 1984).

A student was convicted in juvenile court for possession of stolen school property. He appealed his conviction on the basis that he made statements to a security officer employed by the school without proper advisement of his *Miranda* rights. The court stated that *Miranda* warnings are no more than procedural safeguards designed to insure that confessions obtained during interrogation are not a result of overbearing compulsion caused by isolation of a suspect in police custody. *Miranda* does not apply "outside the context of inherently coercive custodial

interrogations for which it was designed." Thus, *Miranda* warnings need not be given by other than law enforcement officers. Furthermore, the court held that the security officer employed by the school was not considered as a law enforcement officer triggering the requirements of *Miranda*. ***State v. Wolfer***, 693 P.2d 154 (Wash. Ct. App. 1984).

A student was suspended for five days for an off-campus assault on the mother of a friend. The parents of the student claimed that the boy's interrogation by the superintendent and the assistant principal was improper since the student was not advised that he could call his parents before discussing the incident. The court held that there is no requirement for Miranda-type warnings in informal, noncustodial discussions. ***Pollnow v. Glennon***, 594 F. Supp. 220 (S.D.N.Y. 1984); *aff'd*, 757 F.2d 496 (2d Cir. 1985).

As a result of an investigation of several thefts, a vice-principal questioned a student in the presence of a police officer who was assigned to the school as a liaison. As a result of the questioning and subsequent search, the student was suspended. She claimed that her right to due process was violated since she was not informed of her right to remain silent and her right to counsel. The court held that the questioning was non-custodial despite the fact that it was done with a police liaison officer present. Thus, the student did not have a right to *Miranda* warnings. ***Cason v. Cook***, 810 7F.2d 188 (8th Cir. 1987), *cert. denied*, 482 U.S. 930 (1987).

Basis of Suspension or Expulsion

A student was expelled for consuming alcohol on a school-sponsored band trip. The trial court held that the school district acted arbitrarily in automatically expelling the student without considering any other factors. An appellate court affirmed, stating that the trial court's findings that the Board failed to consider previous general conduct and alternate punishment constituted substantial evidence upon which the trial court could base its conclusion. ***Clark County Bd. of Educ. v. Jones***, 625 S.W.2d 586 (Ky. Ct. App. 1981).

Five students distributed leaflets during school hours which advocated a "walk out" from high school classes in protest of school disciplinary policies. As a result, the students were expelled for the remainder of the semester. On appeal, the students claimed that their expulsion was based on an impermissible infringement of their First Amendment rights to free speech. The court, while recognizing that the students' conduct fell within First Amendment protections, ruled that the expulsions did not violate the student's constitutional rights. Freedom of expression in a school setting must be balanced against the forecast of the material disruption that such expression might produce. Since wide-scale walk outs from classes would materially interfere with the educational environment of the school, the board was within its rights to discipline students for their actions. ***Dodd v. Rambis***, 535 F. Supp. 23 (S.D. Ind. 1981).

A student was expelled after assaulting another student with a stick. The student appealed claiming that the Board abused its discretion in expelling him on the facts of the case. The court held that the School Board was within its rights to expel the student since its judgment was based on a plain violation of its rules of conduct, the student's prior record, the premeditated nature of the assault, and the student's use of a weapon which resulted in physical injury to another student. ***Porter v. Board of Sch. Directors of Clairton Sch. Dist.***, 445 A.2d 1386 (Pa. Commw. Ct. 1982).

A student was suspended for an assault on a woman. The commissioner of education found that the board exceeded its authority in suspending the student for allegedly assaulting a woman during a vacation period and off school grounds. The woman was neither a school employee nor a student; and thus, under the circumstances, the assault had no connection to the school. The court affirmed, holding that it may not substitute its judgment for that of the commissioner of education unless such judgment is arbitrary and capricious or lacks a rational basis. ***Board of Educ. of Millbrook Cent. Sch. Dist. v. Ambach***, 465 N.Y.S.2d 77 (N.Y. App. Div. 1983).

A student was expelled for selling marijuana on school property. He challenged his suspension claiming that the basis of the board's decision did not comply with the statutory standard for expulsion. The court held that the finding of the board that the sale of marijuana on school property gravely affected the well-being of other students and made the continued presence of the student harmful to the welfare of the school clearly satisfied the provisions of the statute under which the student was suspended. ***Rutz v. Essex Junction Prudential Comm.***, 457 A.2d 1368 (Vt. 1983).

A student was automatically suspended for violating a local school board rule prohibiting students from attending a school function if they had consumed alcohol. The court held that the basis of the student's suspension was invalid because the rule upon which the District relied conflicted with a regulation of the state board of education mandating that no student could be suspended until other forms of corrective action were tried and failed. Since the record did not show that any other corrective measures were tried before suspending the student, such

action by the local board was invalid. ***Quinlan v. University Place Sch. Dist. 83***, 660 P.2d 329 (Wash. Ct. App. 1983).

School officials suspended several students for academic failures, for their parents' failure to sign discipline slips, and for other infractions not enumerated in the suspension section of the education code. The students sued. The court held that the school violated the students' due process rights by arbitrarily suspending them for reasons not enumerated in the statute, and by suspending them without first exhausting other means of correction as mandated by the statute. ***Slayton v. Pomona Unified Sch. Dist.***, 207 Cal. Rptr. 705 (Cal. Ct. App. 1984).

Two students were suspended for the remainder of the semester for defacing school property. Their suspension was based on a rule mandating suspension for such offenses. The school board argued that the punishment selected was within its authority, and it should be able to exercise its discretion without judicial interference. The court held that the board was within its rights, as authorized by statute, to suspend the students for defacing school property. Furthermore, the mandatory nature of the rule did not deprive the board of authority to administer the rule with leniency and flexibility. ***Clinton Mun. Separate Sch. Dist. v. Byrd***, 477 So. 2d 237 (Miss. 1985).

A student was expelled from school for use of marijuana. The offense was reported by an undercover agent in whose presence the student used the drug. His parents claimed that the expulsion was in violation of the statute because their son's misconduct was not reported by a teacher or other school employee. An appellate court held that the statute only requires that procedures be established by which teachers and other school personnel can report violations of school rules. It does not prevent anyone other than a school employee from reporting a violation committed in his or her presence but not witnessed by a school employee. ***Abadie v. St. Bernard Parish Sch. Bd.***, 485 So. 2d 596 (La. Ct. App. 1986).

Students were suspended for three days for the distribution of an unofficial school newspaper which contained vulgar and indecent language and advocated violence against teachers. Students challenged their suspensions as a violation of their First Amendment rights and of the state's Pupil Fair Dismissal Act. The court held that the school was within its rights to impose a three day suspension when the exercise of free speech rights leads to substantial disruption of school activities and where the publication contained lewd language and advocated violence against teachers. Furthermore, while the school officials did not follow all of the technicalities of the Pupil Fair Dismissal Act in that notice was not served on the students on or before the suspension was to take place, but was mailed to the students' parents, their actions did not violate the substance of due process protections incorporated in the Act. ***Bystrom by and through Bystrom v. Fridley High Sch.***, 686 F. Supp. 1387 (D. Minn. 1987), *aff'd*, 855 F.2d 855 (8th Cir. 1988).

Students were expelled for one year for falsely reporting bomb threats. They claimed that their expulsions violated school board regulations which impose a ten-day suspension for a first offense bomb threat. The court ruled that the board's regulations specifically state that the listed penalties are the minimum for each offense. Thus, the board was entitled to set greater penalties based on the severity of the consequences stemming from the students' wilful violation of school rules. ***Keith D. v. Ball***, 350 S.E.2d 720 (W. Va. 1986).

A student was expelled for use of marijuana during school hours but off school grounds. The court found that the basis upon which the boy was expelled was insufficient. The relevant statute states that the violation must occur on school grounds or in school buses. Thus, it could not be applied to conduct occurring off school grounds. ***Labrosse v. St. Bernard Parish Sch. Bd.***, 483 So. 2d 1253 (La. Ct. App. 1986).

A student, suspended on academic grounds, appealed claiming that her due process rights were violated. The court noted that the New York statute and Goss apply to suspension for improper behavior, but the standard for academic discharge differs greatly from other discharges. The court upheld the basis of the suspension indicating that a high degree of deference to professional expertise is appropriate in matters of academic discharge. Furthermore, numerous meetings between the school and the student and her mother concerning plaintiff's academic problems more than satisfied due process requirements. ***Spencer v. New York City Bd. of Higher Educ.***, 502 N.Y.S.2d 358 (N.Y. Sup. Ct. 1986).

A student was suspended for the remainder of the school year by the school board for insubordination after receiving two previous five-day suspensions from the school principal. The court ordered the student's records expunged of any reference to the two five-day suspensions unilaterally imposed by the principal. It reasoned that the principal was not empowered to unilaterally suspend a student under the educational law then in existence. However, the court upheld the suspension imposed by the superintendent and affirmed by the school board since the statute clearly empowered the board with authority to suspend and the evidence supported the board's determination. ***Underwood v. Board of Educ. of City Sch. Dist. of City of Kingston***, 498 N.Y.S.2d 907 (N.Y. App. Div. 1986).

A student, after having drunk two beers while visiting a college, returned to school to attend wrestling practice. When confronted by his coach, he admitted to drinking beer. Following a hearing, he was suspended by the board of education. The trial court overturned the suspension, stating that the rule under which the suspension was imposed was overly broad and allowed punishment of students who were not disruptive but only had alcohol on their breath. An appellate court affirmed. The Supreme Court of Ohio disagreed, ruling that a board of education must have the authority to regulate student use of alcohol in school. Consequently, regardless of whether parents have the right to permit their children to drink, the school has the authority to suspend when students drink alcohol and then attend school events. ***In re Suspension of Huffer from Circleville High Sch.***, 546 N.E.2d 1308 (Ohio 1989).

Within a three-year period, a student was referred to the principal's office over 20 times for inappropriate behavior. A variety of sanctions was placed on the student including counseling, suspension, and corporal punishment. The student continued to attack other students and threaten teachers. The principal notified the student's parents that a disciplinary hearing would be held at which time permanent expulsion would be recommended. After a hearing, the Board of Education unanimously voted to permanently expel the student. The court held that school board officials have the authority to maintain good order and discipline in the school. It affirmed the school board's decision since the student had a lengthy history of disruptive behavior, the school attempted to remediate the behavior through various methods, and there was no shocking disparity between the offenses and the penalty. ***Scoggins v. Henry County Bd. of Educ.***, 549 So. 2d 99 (Ala. Civ. App. 1989).

Suspension or Expulsion as Appropriate Punishment

Parent and student representatives brought an action challenging suspensions for parents' failure to pay text book fees. The court held that denying access to school because of non-payment of school fees was in and of itself illegal under state law. Furthermore, it not only violated state law but also the equal protection clause of the U.S. Constitution. ***Carder v. Michigan City Sch. Corp.***, 552 F. Supp. 869 (N.D. Ind. 1982).

A student was suspended for her failure to surrender her purse for inspection by school officials. The court held that suspension was appropriate since the warrantless search was justified and the turmoil caused by plaintiff's distribution of firecrackers justified the punishment rendered. ***Bahr v. Jenkins***, 539 F. Supp. 483 (E.D. Ky. 1982).

The school board expelled two students for taking two sips of soda mixed with whiskey while participating as cheerleaders at a football game. The trial court modified what it considered to be an excessive penalty imposed on the students. It found that the two girls were good students with no prior disciplinary record. The court concluded that the punishment ordered by the board far exceeded the nature of the offense. ***Tomlinson by Tomlinson v. Pleasant Valley Sch. Dist.***, 479 A.2d 1169 (Pa. Commw. Ct. 1984).

A student was expelled after admitting that he brought alcohol onto the school campus contrary to the rules of the school. The student appealed claiming that the punishment imposed was excessive and unfair. The court stated that school disciplinary matters are best resolved by school boards, and the courts should only interfere when there is a "shocking disparity between offense and penalty." In the present case, the court found that the Board's action was in response to a major crises of drug and alcohol abuse in the school. While plaintiff's punishment was severe, it was not so severe as to be arbitrary and unjust. ***Adams v. City of Dothan Bd. of Educ.***, 485 So. 2d 757 (Ala. Civ. App. 1986).

A student was expelled for possession of marijuana on school grounds. On appeal, he contended that the code of conduct imposed by the School District was arbitrary and capricious. The court found that the District enacted the rule under which the student was suspended to prevent a serious drug problem from imperiling its educational programs. The rule and its sanctions were clearly set forth in the district's code of conduct. It was neither arbitrary nor capricious but rather a commendable effort to deal with a serious, destructive problem. ***Rucker v. Colonial Sch. Dist.***, 517 A.2d 703 (Del. Super. Ct. 1986).

After a hearing, a student was suspended for the remainder of the year for physically assaulting and profanely threatening teachers and students. In its opinion, the court noted that a student's right to an education may be constitutionally denied when outweighed by the school's interest in maintaining a safe environment. Consequently, suspension or expulsion is appropriate whenever the misconduct is of a type that the school may legitimately prohibit. Reasonable regulations punishable by suspension merely deny the right to engage in a prohibited activity. They do not deny the right to an education. ***Matter of Jackson***, 352 S.E.2d 449 (N.C. Ct. App. 1987).

The School Board expelled a student for possessing one marijuana joint on school grounds in violation of school board rules. On appeal, the student claimed that the Board erred in ordering her expulsion since the principal did not comply with statutory provisions requiring him to furnish a detailed report on alternate measures taken prior to expulsion. The court found that the expulsion was proper since the statute did not require that alternate measures be taken prior to expulsion. The court also noted that the Board was not required to furnish the student an alternative educational program during the term of her suspension. ***Walter v. School Bd. of Indian River County***, 518 So. 2d 1331 (Fla. Dist. Ct. App. 1987).

Two students were suspended from school and from participation on the basketball team for drinking alcohol at a school-sponsored event. Their actions violated explicit prohibitions contained in the student handbook. The students challenged their suspension as unreasonable in light of the circumstances. The court disagreed. It held that mandatory suspensions for use of alcohol on a school sponsored trip is appropriate. Students have a need to be subjected to constructive discipline. Furthermore, our cultural traditions recognize that due discipline in the rearing of the young is necessary and wholesome and not a violation of their personal rights. ***Katchak v. Glasgow Indep. Sch. Sys.***, 690 F. Supp 580 (W.D. Ky. 1988).

A student was suspended for ten days for possession of drug paraphernalia in violation of school regulations. The student appealed, claiming that the board's actions were unreasonable. The court held that the expulsion order did not constitute arbitrary, capricious, or unreasonable action. Rather, it was based on the student's violation of a clearly-stated board policy of which the student was aware. The board of education had the right and affirmative duty to enforce its rules despite mitigating circumstances such as grades and redeeming qualities. The rule was enforced in accordance with the law; thus, plaintiff was not denied his right to due process. ***Cross v. Princeton City Sch. Dist.***, 550 N.E.2d 219 (Ohio C.P. Ct. 1989).

A student was suspended for ten days beginning March 10, 1987 for bringing a loaded gun to school in order to sell it. During the suspension, an expulsion hearing was scheduled for March 23rd which the student postponed for four months. At the hearing on July 23rd, the student was expelled for 180 days—the maximum term permitted under law. The expulsion was effective the first day of school the following fall. The board denied the student credit for the three months of school he had missed during his postponement of the expulsion hearing. The student appealed claiming that the board violated his substantive due process rights by denying him credit for time served while waiting for the expulsion hearing. The court held that this denial did not violate any due process rights of the student. The board's action was clearly not arbitrary but was rationally related to its legitimate interest in maintaining discipline in the schools and preventing the disruption attendant upon the student reentering school late in the year. ***Rosa R. v. Connelly***, 889 7F.2d 435 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 3225 (1990).

A student was expelled for carrying a gun and ammunition while in school. He challenged his expulsion as being arbitrary, unreasonable, capricious, and oppressive. The appellate court, in a strongly worded opinion, held that carrying a gun in school cannot be endorsed and must be condemned. Expulsion was not arbitrary, capricious, or unreasonable but appropriate condemnation for such behavior. Consequently, the school board did not abuse its discretion in expelling a student who was caught in school in possession of a loaded gun, knew that his conduct was against the rules, and knew that his behavior could result in expulsion. ***Lusk by and through Lusk v. Triad Community Unit No. 2***, 551 N.E.2d 660 (Ill. App. Ct. 1990).

A student was found drinking alcohol on school property. In the discussions that followed, she revealed that she had been a victim of child molestation. The school suspended her while filing a request to expel her for the remainder of the semester. At the same time, the juvenile court determined that she was "a child in need of services" and that she must attend school regularly and maintain passing grades. The juvenile court obtained an injunction forbidding the school district from expelling her. The district appealed, positing that the determination of whether a student was to remain in school is a matter solely within its province. The court held that the school district could be enjoined from expelling a child "in need of services" as determined by the juvenile court. It found that the child would suffer irreparable injury if she were not permitted to return to school following her disclosure of sexual molestation. Consequently, the needs of the child under these special circumstances must override the rights of the school board to maintain an orderly environment within the schools. ***Matter of P.J.***, 575 N.E.2d 22 (Ind. Ct. App. 1991).

Two students were expelled for the remainder of the school year for participation in a fight that occurred off school grounds and after school hours. The court overturned the expulsions. It found that the evidence against the students was conflicting and confusing, and the punishment imposed was so harsh as to constitute an abuse of discretion. The court stated that in reviewing a board's action to determine

whether it had abused its discretion, the court will consider the egregiousness of the conduct, the student's past conduct, the likelihood that such conduct will affect the educational environment, the severity of the punishment, and the interest of the child. In the present case, there was no evidence that these students, who had no prior record of misconduct, would substantially disrupt or materially interfere with other school activities. ***Robinson v. Oak Park and River Forest High Sch.***, 571 N.E.2d 931 (Ill. App. Ct. 1991).

Table of Cases

Abadie v. St. Bernard Parish Sch. Bd./30
Adams v. City of Dothan Bd. of Educ./31
Adams v. School Bd. of Brevard County/27
Bahr v. Jenkins/31
Big Spring Sch. Dist. v. Hoffman by Hershey/27
Birdsey v. Grand Blanc Community Schs./28
Board of Educ. of Millbrook Cent. Sch. Dist. v. Ambach/29
Board of Educ. of Rogers, Ark. v. McCluskey/26
Boster v. Philpot/23
Boynton v. Casey/28
Brands v. Sheldon Community Sch./28
Brewer by Dreyfus v. Austin Indep. Sch. Dist./25
Bystrom by and through Bystrom v. Fridley High Sch./30
Carder v. Michigan City Sch. Corp./31
Carey on behalf of Carey v. Maine Sch. Administrative Dist. No. 17/25
Cason v. Cook/29
C.J. v. School Bd. of Broward County/26
Clark County Bd. of Ed. v. Jones/29
Clinton Mun. Separate Sch. Dist. v. Byrd/30
Cole by and through Cole v. Newton Special Mun. Separate Sch. Dist./24
Consolidated Sch. Dist. No. 2 v. King by Dresselhaus/28
Cross v. Princeton City Sch. Dist./32
Darby v. Schoo/23
Davis by Davis v. Churchill County Sch. Bd. of Trustees/24
Dodd v. Rambis/29
Doe v. Rockingham County Sch. Bd./24
Draper v. Columbus Pub. Schs./24
Drolshagen, *In re*/28
Forrest v. School City of Hobart/27
Goss v. Lopez/22
Huffer from Circleville High Sch., *In re Suspension of*/31
Jackson, *Matter of*/31
Jenkins v. Ouachita Parish Sch. Bd./27
John A. v. San Bernardino City Unified Sch. Dist./26
Jones v. Brevard County Sch. Bd./27
Jones v. Board of Trustees of Pascagoula Mun. Separate Sch. Dist./25, 28
Katchak v. Glasgow Independent Sch. Sys./32
Keith D. v. Ball/30
Keough v. Tate County Bd. of Educ./22
Klein v. Smith/27
Labrosse v. St. Bernard Parish Sch. Bd./30
Lamb v. Panhandle Community Unit Sch. Dist. No. 2/26
Lusk by and through Lusk v. Triad Community Unit No. 2/32
McClain v. Lafayette County Bd. of Ed./22
McClellan, *Appeal of*/26
McEntire v. Brevard County Sch. Bd./27
Menke v. Ohio High Sch. Athletic Ass'n/23
Mifflin County Sch. Dist. v. Stewart by Stewart/23
Newsome v. Batavia Local Sch. Dist./25
Norristown Area Sch. Dist. v. A.V. by and through V.V./22
Palmer by Palmer v. Merluzzi/24
Paredes by Koppenhoefer v. Curtis/26
Pittsburgh Bd. of Pub. Educ. v. MJN by NJN/25
P.J., *Matter of*/32
Pollnow v. Glennon/29
Porter v. Board of Sch. Directors of Clairton Sch. Dist./29
Quinlan v. University Place Sch. Dist. 83/30
Racine Unified Sch. Dist. v. Thompson/26
Reasoner by Reasoner v. Meyer/28
Reineman v. Valley View Community Sch. Dist. # 365 U/23
Robinson v. Oak Park and River Forest High Sch./33
Rosa R. v. Connelly/32
Rossman v. Conran/25
Rucker v. Colonial Sch. Dist./25, 31
Rutz v. Essex Junction Prudential Committee/29
Salazar v. Luty/24
Scoggins v. Henry County Bd. of Educ./31
Shank v. Hegele/26
Slayton v. Pomona Unified Sch. Dist./30
Spencer v. New York City Bd. of Higher Educ./30
Smith v. Little Rock Sch. Dist./27
State v. Wolfer/29
Stratton v. Wenona Community Unit Dist. No. 1/23
Sykes v. Sweeney/24
Tomlinson by Tomlinson v. Pleasant Valley Sch. Dist./27, 31
Underwood v. Board of Educ. of City Sch. Dist. of Kingston/30
Walker v. Bradley/22
Walter v. School Bd. of Indian River County/32
Wayne County Bd. of Educ. v. Tyre/23
White v. Salisbury Township Sch. Dist./22
Wilson on behalf of Wilson v. Collinsville Community Unit Sch. Dist. No. 10/26

Case Citations

STUDENT TESTING

THIRTEENTH Series, Number 5

Prepared by Debra J. Madsen, Assistant Dean
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Contents

Achievement/Ability Grouping 36
Gifted Programs 36
Competency Testing 36
Promotion 37
Higher Education 37
Admissions 37
Testing & Grading 37
Table of Cases 38

Achievement/Ability Grouping

Ability grouping is permissible in recently desegregated schools so long as it does not result in resegregation of classes or schools. ***Bester v. Tuscaloosa City Bd. of Educ.***, 722 F.2d 1514 (11th Cir. 1984).

An elective high school advanced placement English section is not ability grouping when the course may be freely selected by a student without such specific entrance requirements as achievement test scores, school grades, teacher evaluations, or school counselor recommendations. ***Andrews v. City of Monroe***, 730 F.2d 1050 (5th. Cir. 1984).

Achievement grouping is permissible in a school district that has not been declared fully unitary if the school district can demonstrate that its assignment method is not based on the present results of past segregation or will remedy such results through better educational opportunities. ***Georgia State Conference of Branches of NAACP v. State of Ga.***, 775 F.2d 1403 (11th Cir. 1985).

Achievement grouping bore a manifest demonstrable relationship to classroom education and is an accepted pedagogical practice. The method used by a school district to assign students to achievement groups must adequately measure the students true abilities in each particular class. ***Georgia State Conference of Branches of NAACP v. State of Ga.***, 775 F.2d 1403 (11th Cir. 1985).

School district's ability grouping practice did not discriminate against Mexican-American students by relying upon English achievement tests when these tests were but one factor used in assigning students to one of the three ability groups. ***Castaneda by Castaneda v. Pickard***, 781 F.2d 456 (5th Cir. 1986).

Achievement grouping is permissible where students are grouped according to specific common needs and objectives based on their skill mastery of a subject. The School District had achieved and maintained unitary status for a sufficient period of time (almost sixteen years) and the "minimal segregative effect" of its grouping practices did not reflect either the effects of past segregation or a contemporary segregative intent. ***Montgomery v. Starkville Mun. Separate Sch. Dist.***, 854 F.2d 127 (5th Cir. 1988).

Students were grouped for instruction in language arts and math based on SAT scores and grouped heterogeneously for other subjects. Also, achievement grouping allowed for a high degree of movement among achievement levels based on standardized test scores, teacher recommendations or upon parental request. This achievement grouping system was permissible since it neither intended nor had the effect of a significant racial impact upon the makeup of the classrooms in the various schools. ***Quarles v. Oxford Mun. Separate Sch. Dist.***, 868 F.2d 750 (5th Cir. 1989).

Although school district failed to show it had achieved unitary status, achievement grouping for gifted and educable mentally handicapped classes was permissible when there was no evidence to suggest that the racial imbalances in these classes are vestiges of prior segregation. ***Jacksonville Branch, NAACP v. Duval County Sch. Bd.***, 883 F.2d 945 (11th Cir. 1989).

Gifted Programs

School district's use of standardized test in determining eligibility for special communications class for gifted students was permissible. The use of a minimum cut-off score on the standardized test was rationally related to the objective of identifying gifted children. ***Student Doe v. Commonwealth of Pa.***, 593 F. Supp. 54 (E.D. Pa. 1984).

State law assigning students to gifted programs on the basis of IQ (130 or above) is valid since the program is rationally related to a legitimate state interest in providing special education to gifted children. ***Student Roe by Roe v. Commonwealth of Pa.***, 638 F. Supp. 929 (E.D. Pa. 1986), *aff'd*, 813 F.2d 398 (3d Cir. 1987), *cert. denied*, 483 U.S. 1021 (1986).

The tests and methods used to assess a student's eligibility for the gifted program did not have a discriminatory effect on black students, other than their statistical underrepresentation in the program. ***Jacksonville Branch, NAACP v. Duval County Sch. Bd.***, 883 F.2d 945 (11th Cir. 1989).

Competency Testing

Conferral of high school diploma conditioned upon passage of a competency test is permissible so long as the test is instructionally valid, i.e., the test must be a fair test of that which was in fact taught. ***Debra P. by Irene P. v. Turlington***, 730 F.2d 1405 (11th Cir. 1984).

School district required passage of minimum competency test as one of three graduation requirements for all students. Application of this requirement to handicapped students did not violate the Education for All Handicapped Children Act (EAHCA). EAHCA requires only that all handicapped children in elementary and secondary schools be afforded a

free and appropriate education. It does not guarantee any particular result or level of education. ***Brookhart v. Illinois State Bd. of Educ.***, 697 F.2d 179 (1983).

Promotion

Students had no property right in the expectation that substandard scholastic achievement would continue to be accepted as a basis for promotion. Students have no legitimate expectation that the meaning of "satisfactory work" done in the classroom will remain constantly fixed at a level that in truth is academically unsatisfactory. ***Bester v. Tuscaloosa City Bd. of Educ.***, 722 F.2d 1514 (11th Cir. 1984).

Promotion from first to second grade is not a constitutionally protected liberty or property interest and, therefore, failure to promote was not violative of procedural due process. ***Killion by Ackers v. Burl***, 860 F.2d 306 (8th Cir. 1988).

Higher Education

Admissions

Admission policies of state universities, including use of ACT minimum score, were not adopted and developed in good faith and for nondiscriminatory purposes. ***Ayers v. Allain***, 914 F.2d 676 (5th Cir. 1990), *cert. granted*, 111 S. Ct. 1579 (1991).

Testing & Grading

Judicial review of an educational institution's judgment of a student's academic performance is limited to the question of whether the challenged determination was arbitrary and capricious, irrational, made in bad faith or a lconstitutional or statutory violation. ***Susan M. v. New York Law Sch.***, 556 N.E.2d 1104 (N.Y. 1990).

A student alleged that her professor gave zero credit on an essay question worth 30% of the exam grade because the student: (1) analyzed the problem under both Delaware and New York law when only Delaware law was asked for and that she would have received full credit had she refrained from mentioning New York law; (2) misused the term "oppressive conduct;" and (3) wrote the exam in the style of a first-year student. The court found this appeal did not meet the requirements for judicial review. ***Susan M. v. New York Law Sch.***, 556 N.E.2d 1104 (N.Y. 1990).

Table of Cases

Andrews v. City of Monroe/36
Ayers v. Allain/37
Bester v. Tuscaloosa City Bd. of Educ./36, 37
Brookhart v. Illinois State Bd. of Educ./37
Castaneda by Castaneda v. Pickard/36
Debra P. by Irene P. v. Turlington/36
Georgia State Conference of Branches of NAACP v. State of Ga./36
Jacksonville Branch, NAACP v. Duval County Sch. Bd./36
Killion by Ackers v. Burl/37
Montgomery v. Starkville Mun. Separate Sch. Dist./36
Quarles v. Oxford Mun. Separate Sch. Dist./36
Student Doe v. Commonwealth of Pa./36
Student Roe by Roe v. Commonwealth of Pa./36
Susan M. v. New York Law Sch./37

Case Citations

STUDENT FIRST AMENDMENT RIGHT IN THE 1990

THIRTEENTH Series, Number 6

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Contents

Freedom of Speech 40

Freedom of Association 40

Religious Expression 40

The Equal Access Act and Student Organized Prayer Clubs 40

Access to Public School Facilities 40

Prayer at Public School Graduations 41

Religion in the Public School Classrooms 41

Distribution of Religious Literature in Public Schools 42

Religious Art in Public Schools 42

The Pledge of Allegiance and Religious Belief 42

Home School 42

Table of Cases 44

Freedom of Speech

A family planning organization unsuccessfully challenged a school district's policy guidelines under which some high schools rejected its advertisements in school newspapers, yearbooks, and athletic programs where the publications were not a public forum, where the schools did not create a limited-purpose public forum for advertising goods and services that are lawfully available to high school students, and where the schools' justification for refusing to publish the advertisements was reasonable. ***Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.***, 941 F.2d 817 (9th Cir. 1991).

The First Amendment rights of a high school student denied permission to run for president of the student council were not violated where the school's decision was based on legitimate pedagogical concerns over his maturity and leadership ability rather than his claim that he was retaliated against for exercising his constitutional rights. ***Bull by Bull v. Dardanelle Pub. Sch. Dist. No. 15***, 745 F. Supp. 1455 (E.D. Ark. 1990).

Freedom of Association

School board regulations which prohibited students from attending parties at which alcohol was served and under which a high school swimmer who did not observe the policy was subjected to a one week suspension from the swimming team did not violate her First Amendment right to freedom of association since the policy was reasonably related to the board's legitimate concern in deterring alcohol consumption among students. ***Bush by and through Bush v. Dassel-Cokato Bd. of Educ.***, 745 F. Supp. 562 (D. Minn. 1990).

Religious Expression

The Equal Access Act and Student Organized Prayer Clubs

Under the federal Equal Access Act (EAA), student organized and sponsored non-curriculum related Bible study clubs cannot be denied permission to meet on public school premises during non-instructional time due to the religious content of their speech where a school receives federal financial assistance and has created a limited open forum. ***Board of Educ. of Westside Community Schs. v. Mergens by and through Mergens***, 496 U.S. 226, 110 S. Ct. 2356, 110 L. Ed. 2d 191 (1990).

Despite a conflict with a state constitutional provision which arguably prohibits religious groups from using public school property, students who wished to form a Christian religious club to read and discuss the Bible during non-instructional time were permitted to do so under the federal EAA; under the Supremacy Clause federal law prevails in direct conflicts with state constitutional law. ***Hoppock by and through Hoppock v. Twin Falls Sch. Dist. No. 411***, 772 F. Supp. 1160 (D. Idaho 1991).

Where application of the EAA permitting a student religious group to meet in a high school classroom before the start of the school day would violate the provisions of the Washington constitution which prohibited sectarian influences in the public schools and impermissible appropriation of public money or property for religious purposes, the Supremacy Clause did not bar the state from limiting the application of the EAA. ***Garnett v. Renton Sch. Dist.***, 772 F. Supp. 531 (W.D. Wash. 1991).

Access to Public School Facilities

A school district was ordered to lease its facilities to a nonprofit religious organization so that it could provide a free Christmas community dinner because by allowing other organizations to use the facilities for expressive activities, the district created a public forum from which it could not bar the religious organization. ***Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. No. 5***, 941 F.2d 45 (1st Cir. 1991).

A school district was not permitted to deny a religious organization's application for use of a school auditorium for a fund-raiser with a religious theme where the District had at least created a limited public forum and its denial of the application, after having previously granted one to another fund-raiser with a different religious theme, was not viewpoint-neutral as a matter of law in the absence of a constitutionally sufficient explanation for differential treatment. ***Travis v. Owego-Applachin Sch. Dist.***, 927 F.2d 688 (2d Cir. 1991).

A school board was precluded from denying a religious group access to a high school auditorium so that it could present a magic show followed by a religious testimonial and the distribution of religious literature where the District's policy and past practice had created a designated open public forum; also, the policy under which the District granted access to its facilities to a wide variety of outside groups had no religious objective or nonsecular purpose, did not have the effect of advancing religion, and did not promote excessive entanglement with religion. ***Gregoire v. Centennial Sch. Dist.***, 907 F.2d 1366 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 253 (1990).

Where a school board permitted elementary school students who were members of a Bible study club to meet at the school at 6:30 PM rather than immediately after school, there was no violation of the students' first amendment rights because as a non-public forum the school was justified in placing reasonable restrictions on the time and manner in which its facilities were used. ***Quappe v. Endry***, 772 F. Supp. 1004 (S.D. Ohio 1991).

A religious organization seeking to use a school district's facilities for, among other purposes, a Sunday School and a film series of a religious nature, was denied access to the facilities where the refusal was viewpoint neutral in so far as neither the school district's policy nor state law lists religious worship or instruction as permissible uses of public school facilities. ***Lamb's Chapel v. Center Moriches Union Free Sch. Dist.***, 770 F. Supp. 91 (E.D.N.Y. 1991).

A nonprofit corporation which sponsored a summer religious program for economically disadvantaged children was granted injunctive relief ordering a school board not to revoke its permits granting access to school facilities where the district had created a designated open forum and then sought to revoke the permits because of the religious content of the program. ***Youth Opportunities Unlimited, Inc. v. Board of Pub. Educ. of Sch. Dist. of Pittsburgh, Pa.***, 769 F. Supp. 1346 (W.D. Pa. 1991).

Prayer at School Graduations

Graduating seniors and their parents were denied an injunction against prayer at a high school graduation where the School District's resolution allowing student volunteers who had the permission of the senior class to present nonsectarian, nonproselytizing graduation prayers did not violate the establishment clause since the resolution had a secular, solemnizing purpose and primary effect and did not excessively entangle the District with religion. ***Jones v. Clear Creek Indep. Sch. Dist.***, 930 F.2d 416 (5th Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3161 (U.S. Aug. 20, 1991) (No. 91-310).

A school district was precluded from having prayer at a middle school graduation where the benediction, delivered by a member of the clergy, violated the establishment clause and where the practice of permitting such a prayer had a primary purpose that was found to be religious, could be interpreted as communicating a message of governmental endorsement of religion, and produced excessive entanglement with religion due to the school officials' supervision of the content of the prayer. ***Weisman v. Lee***, 908 F.2d 71090 (2d Cir. 1990), *cert. granted*, 59 U.S.L.W. 3635 (U.S. Mar. 18, 1991) (No. 90-1014).

A graduating senior was denied an injunction where she was unable to establish that a school district's decision to lease the high school auditorium to a nondenominational student study group for a religious baccalaureate service open to graduating seniors and their families violated the establishment clause. ***Randall v. Pegan***, 765 F.Supp. 793 (W.D.N.Y. 1991).

High school students who brought suit seeking to enjoin invocations and benedictions at school graduations were denied relief where they were unable to establish the likelihood of success on their claim that school officials violated the establishment clause of the state constitution which is identical to the one in the federal Constitution. ***Albright v. Board of Educ. of Granite Sch. Dist.***, 765 F. Supp. 682 (D. Utah 1991).

A school district was enjoined from including religious invocations at high school graduation ceremonies where the sponsorship of such prayers inevitably and impermissibly conveyed the message that the district favored or preferred the religious beliefs expressed by the speakers and where official approval of the speakers and governmental monitoring of the content of religious speech impermissibly entangled government in religious matters; the practice also violated the religion clauses of the state constitution. ***Sands v. Morongo Unified Sch. Dist.***, 809 P.2d 809 (Cal. 1991), *petition for cert. filed*, 60 U.S.L.W. 3209 (U.S. Sept. 20, 1991) (No. 91-477).

Religion in the Public School Classroom

The removal of two books with Christian themes from a fifth grade teacher's classroom library while permitting books on Native American religions and Greek gods and goddesses to remain on the shelves was not violative of the First Amendment religious or speech and expression rights where the school district had a secular purpose in removing the books and where the primary effect was not to disapprove of Christianity but to avoid the perceived effect of communicating a message of endorsement of religion to impressionable students. ***Roberts v. Madigan***, 921 F.2d 1047 (10th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 2415 (Mar. 15, 1991) (No. 90-1448).

A school board's prohibition of the teaching of creation science as a rebuttal to a statement in a junior high school social studies textbook that the world is over four billion years old is not violative of the First Amendment because the First Amendment does not give a teacher the right to vary the content of the curriculum once it has been established by the school board. ***Webster v. New Lenox Sch. Dist. No. 122***, 917 F.2d 1004 (7th Cir. 1990).

Distribution of Religious Literature in Public Schools

A school corporation's policy of permitting Gideon Bibles and other religious literature to be distributed in its elementary and middle schools did not violate the establishment clause where the policy had a secular purpose, was not likely to be perceived as endorsing Christianity, and where there was no excessive entanglement between government and religion. ***Berger by Berger v. Rensselaer Cent. Sch. Corp.***, 766 F. Supp. 696 (N.D. Ind. 1991).

A high school student successfully challenged a school district's policy prohibiting the distribution of religious and political materials by students on school property where the content-based ban was insufficiently narrow to satisfy a compelling governmental interest and because it gave school officials unbridled discretion to suppress protected speech in advance without any limits or procedural safeguards. However, the case was ordered to trial on the limited question of whether school officials had reason to anticipate substantial interference with the daily operations of the school if the student had been permitted to distribute religious tracts. ***Slotterback by and through Slotterback v. Interboro Sch. Dist.***, 766 F. Supp. 280 (E.D. Pa. 1991).

Students were denied relief under 42 U.S.C. section 1983 against enforcement or threatened enforcement of a school district's policy which would obstruct them from distributing a religious newspaper in their high school where the school was found to be a nonpublic forum and the restrictions relating to the manner and place of distribution of the newspapers were neither unreasonable nor attempts to suppress student expression. ***Hemry by Hemry v. School Bd. of Colorado Springs Sch. Dist. No. 11***, 760 F. Supp. 856 (D. Colo. 1991).

An indictment for criminal trespass, trespass, and disorderly conduct against an individual who persisted in preaching and distributing religious literature on the grounds of a public high school was reinstated where the statute upon which the indictment was based was neither unconstitutionally vague nor overbroad. ***State v. Lyons***, 802 S.W.2d 590 (Tenn. 1990).

Religious Art in Public Schools

A school district was enjoined from displaying art work with a religious theme, painted and donated by a former high school senior some twenty-five years earlier, in its high school auditorium where the paint ing had the effect of conveying a message of governmental endorsement of Christianity. ***Joki v. Board of Educ. of the Schuylerville Cent. Sch. Dist.***, N.Y., 745 F. Supp. 823 (N.D.N.Y. 1990).

The Pledge of Allegiance and Religious Belief

A state statute providing for the daily recitation of the pledge of allegiance in public elementary schools is not violative of the establishment clause where the purpose of the law is to teach secular, patriotic values and not religious ones, where its primary effect neither advances nor inhibits religion, and where it does not cause excessive entanglement of government with religion. Also, the law is not facially unconstitutional as violative of the free exercise clause despite its use of the term "shall" without explicit exceptions for conscientious objectors because it neither states that "all" students shall say the pledge nor does it call for any penalties against those who refuse to recite it. ***Sherman v. Community Consol. Sch. Dist. of Wheeling Township***, 758 F. Supp. 1244 (N.D. Ill. 1991).

Home Schooling

Requiring a high school student to pass an equivalency examination in order to gain credit for a religious home study program did not violate the student's constitutional rights under the free exercise clause where there was no evidence that similarly situated transferees from nonreligious home schools were provided with an exemption and that he was deprived of one; also, even though the student's objections to the test were based on his religious beliefs, his free exercise rights did not relieve him of the obligation to comply with a valid and neutral law of general applicability. ***Vandiver v. Hardin County Bd. of Educ.***, 925 F.2d 927 (6th Cir. 1991).

Consistency is not required in order for parents to demonstrate the sincerity of their religious beliefs under the state constitution so that children who were being home schooled were not in need of protective services as a result of their parents' refusal to submit them to norm referenced achievement examinations. ***Matter of Welfare of T.K.***, 475 N.W.2d 88 (Minn. Ct. App. 1991).

Parents who were unable to establish the *bona fide* nature of their religious beliefs as a precondition of home schooling their children were correctly denied a religious exemption under the state's compulsory attendance law since the statute does not require a local school board to state its reasons for denying such an exemption and the *bona fide* nature of the parents' beliefs is the sole test for determin-

ing their entitlement to an exemption. ***Johnson v. Prince William County Sch. Bd.***, 404 S.E.2d 209 (Va. 1991).

A father who was unable to demonstrate any sincerely held religious beliefs was precluded from claiming a violation of his rights under the Free Exercise Clause of the First Amendment as a defense to a civil penalty for violations of the state truancy law based on his daughter's absences from school. ***State v. Friel***, 582 A.2d 252 (Me. 1990).

Criminal prosecution of parents under the state's compulsory attendance law for failing to insure that their son attended a school that met the requirements of state law did not violate their First Amendment right to free exercise of religion where the state had a compelling interest in knowing which children were attending a particular school and the school in question had not adequately complied with the private school reporting requirements. ***State v. DeLaBruere***, 577 A.2d 254 (Vt. 1990).

Table of Cases

Albright v. Board of Educ. of Granite Sch. Dist./41
Berger by Berger v. Rensselaer Cent. Sch. Corp./42
Board of Educ. of Westside Community Schs. v. Mergens by and through Mergens/40
Bull by Bull v. Dardanelle Pub. Sch. Dist. No. 15/40
Bush by and through Bush v. Dassel-Cokato Bd. of Educ./40
Garnett v. Renton Sch. Dist./40
Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. No. 5/40
Gregoire v. Centennial Sch. Dist./40
Hemry by Hemry v. School Bd. of Colo. Springs Sch. Dist. No. 11/42
Hoppock by and through Hoppock v. Twin Falls Sch. Dist. No. 411/40
Johnson v. Prince William County Sch. Bd./42
Joki v. Board of Educ. of the Schuylerville Cent. Sch. Dist., New York/42
Jones v. Clear Creek Indep. Sch. Dist./41
Lamb's Chapel v. Center Moriches Union Free Sch. Dist./41
Planned Parenthood of S. Nevada, Inc. v. Clark County Sch. Dist./40
Quappe v. Endry/41
Randall v. Pegan/41
Roberts v. Madigan/41
Sands v. Morongo Unified Sch. Dist./41
Sherman v. Community Consol. Sch. Dist. of Wheeling Township/42
Slotterback by and through Slotterback v. Interboro Sch. Dist./42
State v. DeLaBruere/43
State v. Friel/43
State v. Lyons/42
T.K., *Matter of Welfare of*/42
Travis v. Owego-Applachin Sch. Dist./40
Vandiver v. Hardin County Bd. of Educ./42
Webster v. New Lenox Sch. Dist. No. 122/41
Weisman v. Lee/41
Youth Opportunities Unlimited, Inc. v. Board of Pub. Educ. of Sch. Dist. of Pittsburgh, Pa./41

CASE CITATIONS

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